

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2003-xx

In the Matter of
**FISHERY RESOURCES AND WATER RIGHT
ISSUES OF THE LOWER YUBA RIVER**

Involving Water Right Permits 15026,
15027, and 15030 Issued on
Applications 5632, 15204, and 15574
of Yuba County Water Agency,

Licenses 3984 and 3985 Issued on
Applications 9927 and 12371 of
Cordua Irrigation District

License 4443 Issued on
Application 9899 of Hallwood
Irrigation District, and

Other Water Diversions by Various
Parties Under Claim of Riparian Rights,
Pre-1914 Appropriative Rights,
and Contractual Rights.

SOURCE: Yuba River Tributary to Feather River
COUNTY: Yuba

**ORDER VACATING WATER RIGHT DECISION 1644
AND ADOPTING REVISED WATER RIGHT DECISION 1644
FOLLOWING CONSIDERATION OF ADDITIONAL EVIDENCE
SPECIFIED BY YUBA COUNTY SUPERIOR COURT**

1.0 INTRODUCTION

The State Water Resources Control Board (SWRCB) adopted Water Right Decision 1644 (Decision 1644) on March 1, 2001. The decision addresses fishery resources and water right issues on the portion of the Yuba River from New Bullards Bar Reservoir to the confluence of the Yuba River with the Feather River in Marysville. A primary focus of the decision is

protection of fishery resources in the lower Yuba River downstream of Englebright Reservoir. On May 17, 2001, the SWRCB adopted Order WR 2001-08 which amended specified provisions of Decision 1644 and dismissed several petitions for reconsideration.¹

Several lawsuits challenging adoption of Decision 1644 were consolidated under the title *Browns Valley Irrigation District vs. State Water Resources Control Board* (Yuba County, Superior Court Case No. CV PT 01-0000224). In ruling on a preliminary matter prior to trial, the Yuba County Superior Court granted motions to “admit new evidence” that were filed by Yuba County Water Agency (YCWA) and by the South Yuba River Citizens League and a coalition of conservation organizations (collectively referred to herein as SYRCL). The Court concluded that the SWRCB should reconsider Decision 1644 in light of additional evidence that was not in existence at the time Decision 1644 was adopted.²

The additional evidence consists of declarations of two consulting fishery biologists retained by YCWA, a declaration on water use in the YCWA service area, a January 28, 2003, report of the California Energy Commission on the electrical energy supply situation, and the depositions of two former and one present SWRCB staff members. In accordance with provisions of Code of Civil Procedure section 1094.5(e) regarding consideration of new evidence, the Court remanded the matter to the SWRCB with instructions to vacate and reconsider Decision 1644 in light of the additional evidence.³

On June 5 and 6, 2003, the SWRCB held a hearing to augment the record and consider the additional evidence specified by the Court.⁴ Parties to the hearing were afforded the opportunity

¹ Decision 1644 and Order WR 2001-08 can be found at the SWRCB Division of Water Rights’ web-site: www.waterrights.ca.gov. Unless otherwise noted, references in this order to Decision 1644 refer to Decision 1644 as amended by Order WR 2001-08.

² Yuba County, Superior Court Case No. CV PT 01-0000224, Order After Hearing filed on May 5, 2003. In order to have a complete record, the SWRCB takes official notice of the court orders and the documents that have been filed in litigation concerning Decision 1644 and the proceedings leading to adoption of that decision. (Cal. Code Regs., tit. 23, § 648.2.)

³ Yuba County, Superior Court Case No. CV PT 01-0000224, Amended Judgment and Amended Peremptory Writ of Mandate filed July 3, 2003.

⁴ The Court’s order allowed the SWRCB to consider the depositions of the three staff members or consider live testimony from the deponents. The depositions were admitted into evidence without additional testimony of staff since all parties to the litigation previously had an opportunity to cross-examine the deponents. The three
(footnote continued)

to present testimony, cross-examine witnesses, present rebuttal evidence, present legal arguments, and submit legal briefs. YCWA suggested that the SWRCB should revoke Decision 1644 and encourage parties to reach a settlement. SYRCL recommended eliminating the interim flows specified in Decision 1644, requiring immediate compliance with the long-term minimum flow specified in the decision, and not otherwise revising Decision 1644. Representatives of Browns Valley Irrigation District, Brophy Water District, South Yuba Water District, and Cordua Water District participated in the hearing and were generally supportive of YCWA's positions. Western Water Company stressed the value of resolving the dispute over Yuba River flow matters and supported YCWA's position that recent evidence does not support the need for the increased minimum spring flows required by Decision 1644. The California Department of Fish and Game (DFG) and the United States Department of the Interior presented evidence and arguments which were generally supportive of Decision 1644 and which disputed YCWA's contentions regarding the significance or reliability of the new fishery data referred to by YCWA's consultants.

This order sets forth the SWRCB's evaluation of the additional evidence received at the hearing in light of the existing administrative record. For the reasons discussed below, the SWRCB concludes that the additional evidence does not support any major revisions to the findings or requirements of Decision 1644. This order also concludes that the SWRCB has provided a fair hearing and due process of law to all parties. The order concludes that some minor clarifications and revisions of Decision 1644 are appropriate in light of the new evidence and the passage of two years following adoption of the decision in 2001. Therefore, this order adopts Revised Decision 1644 that includes the minor clarifications and revisions as specified in this order. In accordance with the direction of the Court, this order also vacates Decision 1644 as previously adopted and amended by Order WR 2001-08.⁵

declarations filed with the Court by YCWA were admitted into evidence and were supplemented by testimony of the declarants. The January 28, 2003, report from the California Energy Commission was admitted into evidence and was supplemented by testimony of a staff member from the California Energy Commission.

⁵ The basis for amendments to Decision 1644 specified in Order WR 2001-08 is explained in that order. The amendments to Decision 1644 specified by Order WR 2001-08 are included in Revised Decision 1644 and the SWRCB finds that the findings on the issues addressed by Order WR 2001-08 remain correct.

2.0 BACKGROUND

Decision 1644 discusses the surface water and ground water supplies in the Yuba River watershed, the Yuba River Development Project constructed by YCWA, various uses of water within Yuba County, and the sale of water by YCWA for uses outside of Yuba County. The decision reviews relevant statutes regarding fishery protection and discusses the legal authority of the SWRCB to establish minimum flows and other requirements for protection of fish and other public trust resources. The decision includes extensive discussion and numerous findings regarding fishery issues, water demand for irrigation and other offstream uses, effects of revised minimum flow requirements on other uses of water, and other issues addressed by the parties to the proceeding. Decision 1644 establishes minimum instream flow requirements and requires YCWA and other water users to take actions to protect fishery resources and to comply with other legal requirements governing diversion and use of water. The decision includes extensive citations to a lengthy administrative record.⁶

In evaluating the new evidence specified by the Court, it is very helpful to review the process that led to Decision 1644 and to understand how the additional evidence relates to requirements of Decision 1644 and the existing evidentiary record, particularly regarding the issue of minimum flow requirements. Section 2.1 below summarizes the process that led to adoption of Decision 1644. Section 2.2 summarizes the primary basis for the differences between the minimum flow requirements proposed by YCWA at the hearing in 2000 and the minimum flow requirements that were eventually adopted in Decision 1644. Subsequent sections of this order address the evidence that the Yuba County Superior Court directed the SWRCB to consider.

⁶ Decision 1644 includes numerous citations to the lengthy administrative record. As stated in footnote 1 on page viii of Decision 1644, the citations to the record are provided solely for ease of reference and there is often other supporting evidence in the record that is not specifically cited in the decision. The citations in this decision refer to Decision 1644 and SWRCB Order WR 2001-08 by page number. Reference to exhibits introduced at the June 5 and 6, 2003, hearing are preceded by the year “2003” followed by the abbreviation for the party submitting the exhibit, followed by the number of the exhibit, followed by the page number or other location in the exhibit where the cited information is found. (e.g. “2003-DFG 2, p. 1.”) References to testimony in the court reporter’s transcript from the hearing on June 5 and 6, 2003, are designated as “2003-R.T.” followed by the starting page and line number in the transcript, followed by the ending page and line number in the transcript. (e.g. 2003-R.T. 1:4-1:15.) References to documents from previous SWRCB hearings in this matter and related correspondence are designated by the “Bates” page numbering citations as indicated on the administrative record filed with the Yuba County Superior Court.

2.1 Proceedings Leading to Adoption of Decision 1644

The SWRCB's involvement in the process that led to adoption of Decision 1644 began with the receipt of a complaint filed by a coalition of fishery groups (the "United Groups") in 1988. The complainants contended that the instream-flow requirements in YCWA's water right permits and the fish screening facilities at major diversions on the lower Yuba River did not provide an adequate level of protection for various species of fish. Following an initial investigation, the SWRCB deferred action on the complaint until after it received the DFG's Lower Yuba River Fisheries Management Plan (DFG Plan) in May of 1991.

After receipt of the DFG plan, the SWRCB scheduled a hearing to begin on November 13, 1991, to consider the issues raised in the United Groups complaint and the DFG recommendations. That hearing was postponed due to a lawsuit filed by YCWA in federal court seeking to enjoin the SWRCB from considering revisions to water temperature and instream-flow requirements specified in YCWA's water right permits. Following the court's denial of YCWA's request for a preliminary injunction, the SWRCB held 14 days of hearing in 1992 to receive evidence from interested parties on Yuba River fishery and water right issues.

After the 1992 hearing, the SWRCB Division of Water Rights prepared a staff analysis of the record dated July 1994. A draft water right decision dated April 28, 1996 was also prepared, but not acted upon by the SWRCB. Following distribution of the 1996 draft decision on February 10, 1999, the SWRCB scheduled a second evidentiary hearing to receive new evidence that became available following the 1992 hearing. The second hearing was postponed at the request of YCWA and DFG in order to provide interested parties an opportunity to develop a settlement proposal to be presented to the SWRCB.

YCWA and DFG were unable to agree upon a joint settlement proposal and the SWRCB began the second evidentiary hearing on February 22, 2000. Among the subjects addressed at the hearing in 2000 were the potential benefits and impacts of the minimum flow requirements proposed in the 1996 draft decision, the alternative minimum flow requirements proposed by YCWA, the feasibility of complying with the maximum water temperature requirements in the

1996 draft decision, and the loss of fish in the vicinity of major water diversion facilities on the lower Yuba River.

Following 13 additional days of evidentiary hearing, a revised draft decision dated November 7, 2000, was distributed to the hearing participants. In accordance with provisions of the Bagley-Keene Open Meeting Act, (Gov. Code § 11120 et seq.), the SWRCB also provided an opportunity for public comment on the proposed decision. The SWRCB received extensive comments from parties who had participated in the evidentiary hearing and from numerous other people who appeared at the SWRCB's monthly workshop meetings on December 4, 2000, and January 11, 2001. On March 1, 2001, the SWRCB adopted Decision 1644 which includes several revisions to the November 7, 2000, draft decision. On May 17, 2001, the SWRCB adopted Order WR 2001-08 which made additional revisions to Decision 1644 and dismissed several pending petitions for reconsideration.

2.2 Minimum Instream Flow Requirements Proposed by YCWA in 2000 and Flow Requirements Adopted in Decision 1644

A primary focus of the 1992 hearing was the minimum instream flow proposal contained in the DFG Plan. Based on the evidence received at the 1992 hearing, SWRCB staff prepared a 1996 draft decision that proposed minimum flow requirements that differed from the flow recommendations in the DFG Plan in several respects. For example, the DFG Plan proposed minimum flows that varied seasonally, but the DFG proposal did not recommend different flow requirements based on different water year types.⁷ In recognition of the variations in water availability, the SWRCB's 1996 draft decision proposed one set of minimum instream flow requirements that would apply in normal and wet years, and a second set of requirements that would apply in dry years. Based on evidence presented by YCWA in 1992, the 1996 draft decision also proposed that different minimum flow requirements should apply in the reaches of the river above and below Daguerre Point Dam. (Decision 1644, pp. 53-55.)

⁷ The DFG Plan proposed to adjust for limited water availability in dry years by equitably distributing any deficiencies in the amount of water available to instream and offstream uses, but it did not attempt to quantify reductions to instream flows based on water year type.

At the time of the second hearing in 2000, YCWA presented a new proposal for minimum flows based on the type of water year. YCWA proposed that water years should be divided into five classifications (wet, above normal, below normal, dry and critical). As discussed on pages 56 and 57 of Decision 1644, YCWA proposed that the same minimum flow requirements apply in wet and above normal years, and that very similar flow requirements be adopted for below normal years. For dry years, YCWA proposed minimum flow requirements that were substantially lower and, for critical years, YCWA proposed minimum flows that were even lower still. The minimum flow requirements proposed by YCWA are shown in Table 8 of Decision 1644.

Decision 1644 adopted YCWA's proposal to establish minimum instream-flow requirements based on the water year classification scheme proposed by YCWA, with a minor modification. That modification was to further divide the "critical" water year classification proposed by YCWA into "critical" years and "extreme critical" years for which the minimum flow requirements are somewhat lower than during critical years. The flows proposed by YCWA for the Yuba River at Marysville for each water year type, as well as the long-term flow requirements established in Decision 1644, are shown graphically in Appendix 5 of Decision 1644.⁸

As shown in the graphs in Appendix 5 of Decision 1644, the minimum flow requirements at Marysville for wet and above normal years, as adopted in Decision 1644, are the same as the flows that were proposed by YCWA at the 2000 hearing. Similarly, the flow requirements adopted in Decision 1644 for below normal years at Marysville are the same as the flows proposed by YCWA, except for nine days at the end of April where Decision 1644 requires 1000 cubic feet per second (cfs) rather than the 900 cfs proposed by YCWA.

Appendix 5 also shows that the flows established for dry, critical, and extreme critical years in Decision 1644 are lower than the flow levels proposed in the DFG Plan, but are substantially

⁸ Decision 1644 established both long-term flow requirements that will come into effect on April 21, 2006, and interim flow requirements that apply until April of 2006. Unless otherwise specified, references in this order to the flow requirements established in Decision 1644 refer to the long-term flow requirements.

higher than the flows proposed by YCWA for the period of late April through mid-October of those years. For example, YCWA proposed a minimum flow of at least 800 cfs for June of wet, above normal, and below normal years, but recommended reducing minimum flows to 400 cfs during June of dry years and to as little as 100 cfs during June of critical years. (Decision 1644, p. 57, Table 8; 00EX3364.) In contrast, Decision 1644 requires minimum flows of at least 800 cfs during June of all years except extreme critical years during which minimum flows for June are reduced to 500 cfs. (Decision 1644, p. 76, Table 9.)

As shown in Table 16 of Decision 1644, 53 years of the 71-year period of record used for water supply and demand modeling purposes were classified as wet, above normal, or below normal. Just 18 years, or approximately 25 percent, were classified as dry, critical, or extreme critical years. Due to the similarity of the minimum flow requirements proposed by YCWA and the requirements adopted in Decision 1644 for wet, above normal, and below normal years, a major focus of YCWA's disagreement with Decision 1644 has been on the flow requirements that are expected to apply during the approximately 25 percent of future years that are expected to be classified as dry, critical, or extreme critical.

The evidence presented by YCWA in support of its flow proposal at the hearing in 2000, establishes that the primary reason for the difference between YCWA's flow proposal for dry and critical years and the flows adopted in Decision 1644 is that YCWA's proposal was limited by the amount of water that YCWA estimates will be needed to fully meet YCWA's estimated future water demands for offstream uses at the time YCWA's water demands have reached full development. (S-YCWA-19, pp. 2-8 and 2-9; 00EX3325 and 00EX3326.)⁹ In wet, above normal, and below normal years, when sufficient water is expected to be available to meet all predicted future offstream water demands and the minimum required flows for instream uses, the flows proposed by YCWA and the flow requirements adopted in Decision 1644 are substantially

⁹ YCWA has filed a change petition to add the entire service area of the State Water Project and the Central Valley Project to the place of use authorized in Water Right Permit 15026. (00EX3545-00EX3555.) The estimated full development level of demand referred to by YCWA at the hearing in 2000 does not include additional water to serve uses in the new places of use that YCWA has proposed in its change petitions.

the same. But for those years for which computer modeling results¹⁰ indicate that there will not be sufficient water available to meet YCWA's estimated full development demand and maintain desirable instream flows for protection of fish, YCWA proposes to substantially reduce minimum required flows in order to retain sufficient water to fully serve estimated future demands.¹¹ For dry and critical years, the YCWA proposal would result in substantial reductions to minimum flows during the spring and summer months in order to make water available to meet an estimated future level of demand for offstream uses that may or may not ever fully materialize.¹²

Thus, the record demonstrates that the fundamental basis of the dispute over the instream-flow requirements in Decision 1644 does not stem from differences of opinion among fishery biologists over the appropriate level of instream flows needed for protection of fish in the Yuba River. In the years when adequate water is available for fully meeting offstream consumptive use demands and minimum instream-flow requirements, the flows recommended by the biologists testifying for YCWA were the same or virtually the same as the flow requirements that were eventually adopted in Decision 1644. The major differences between the minimum flows proposed by YCWA and the flow requirements adopted in Decision 1644 for dry, critical, and extreme critical years are the result of different approaches to balancing competing demands for a limited resource. In essence, the YCWA proposal would place the burden of inadequate supplies entirely on instream uses while Decision 1644 reflects a balanced approach to meeting competing demands.

In developing YCWA's minimum flow proposal, YCWA's consultants considered the proposed minimum flows in the 1996 draft decision, but they did not automatically accept the draft decision flows even for those years when there would be adequate supplies for meeting all

¹⁰ As discussed in section 8.1 of Decision 1644, consultants for YCWA developed the Yuba River Basin Model to simulate the operations of major water facilities in the Yuba River Basin. The model was used by YCWA and by the Department of Water Resources Modeling Support Branch at the request of the SWRCB to evaluate various conditions and minimum flow proposals.

¹¹ Because YCWA assumes that water demand for irrigation in dry and critical years will increase, the YCWA proposal assumes that water diversions for offstream uses will actually increase during the dry and critical years when the minimum required instream flows would be substantially reduced.

¹² The differences between YCWA's existing level of demand at the time of the 2000 hearing and YCWA's estimated future level of demand at full development are discussed in sections 7.0 through 7.5 of Decision 1644.

demands. Rather, after reducing the 1996 proposed flow requirements to avoid reductions in water deliveries for offstream purposes,¹³ YCWA's consultants went to the next step of their flow "evaluation protocol" which states:

"Verify that flow benefits essential to maintain fish in 'good condition' can be demonstrated for each period specific minimum requirement specified in the SWRCB 1996 Draft Decision. If essential benefits cannot be demonstrated for one or more period(s), reduce the instream flow requirement(s) for said period(s) to levels that would still maintain fish in "good condition." Make use of all relevant biological and water availability considerations in making decisions regarding the magnitude of any reductions made to the minimum requirements (e.g. flow-habitat relationships, flow-temperature relationships, and flow migration relationships for anadromous salmonids, instream flow and temperature needs of salmonids and other fish species, carry-over effects of period-specific requirement, etc.)." (S-YCWA-19, p. 2-8; 00EX3325.)

The joint written testimony submitted by YCWA in support of its fishery flow proposal at the 2000 hearing goes on to state:

"For wet and above normal years, which have the largest water budget, all available water need not be allocated for instream flow purposes if substantial and demonstrable biological benefits necessary to maintain the river's fish resources in 'good condition' cannot be shown." (S-YCWA-19, p. 2-8; 00EX3325.)

Three fishery biologists presented by YCWA offered testimony in support of YCWA's proposed minimum flow requirements at the 2000 hearing. (e.g. 00RT0994-00RT0996.) The language from the YCWA report cited above establishes that the fishery consultants retained by YCWA based their proposed flows on the assessment that "flow benefits essential to maintain fish in 'good condition' can be demonstrated" for each period of each requirement. If such benefits could not be demonstrated, the proposed flows were reduced to the level that the biologists believed would still keep the fish in good condition. The written testimony also establishes that YCWA's fishery consultants allocated flows to instream uses for wet and above normal years only if flows would provide "substantial and demonstrable biological benefits" necessary to maintain the Yuba River's fishery resources in good condition. (00EX3325.) Thus, the allocation of water to instream uses under the YCWA proposal reflects the conclusion of the

¹³ Offstream purposes include irrigation, waterfowl habitat, municipal and domestic use.

fishery biologists who worked on the proposal that the allotted flows will benefit fish in a substantial way.

As shown in Appendix 5 and in Table 8 on page 57 of Decision 1644, YCWA's fishery flow proposal includes elevated spring flows. As with the other flows proposed by YCWA, the record shows that these flows were based on the conclusion of YCWA's consultants that the flows were necessary to provide substantial and demonstrable biological benefits necessary to maintain fish in good condition.

At the hearing on June 5 and 6, 2003, counsel for YCWA argued against re-adoption of the long-term flow requirements in Decision 1644 stating that DFG was asking the SWRCB to "readopt instream flow requirements which are largely based on their [DFG's] so-called professional judgment without any significant data." (2003-R.T. 457:17-457:20.) Contrary to counsel's statement, the long-term instream flow requirements for wet and above normal years were not based primarily on the professional judgment of DFG biologists.¹⁴ Rather, as indicated by the citations in Decision 1644, the flow requirements were based on evidence from several sources, including DFG, the U.S. Fish and Wildlife Service, the National Marine Fishery Service, and testimony from YCWA's fishery consultants regarding the substantial and demonstrable biological benefits of the flows they recommended in 2000.

In this regard, it is also instructive to recall the recommendations for protection of Yuba River fishery resources that are set forth in the "Working Paper on Restoration Needs" prepared for the U.S. Fish and Wildlife Service by the Anadromous Fish Restoration Program Core Group. ("AFRP Report" dated May 5, 1995; 00EX1370 et seq.) Section X of the AFRP Report shows that the biologists assigned to prepare the technical team report for the Yuba River were Mr. Paul Bratovich and Dr. Mike Bryan of Beak Consultants. (00EX1954.) YCWA called both biologists to testify as expert witnesses in the 2000 hearing and called on Mr. Bratovich to testify again at the hearing on June 5 and 6, 2003.

¹⁴ Although DFG supports the minimum flow requirements established by Decision 1644 as an improvement over the minimum flows specified in a 1965 agreement, the minimum flows required by Decision 1644 are substantially lower than the flows recommended in the DFG Plan.

The AFRP technical report on the Yuba River prepared by Mr. Bratovich and Dr. Bryan identifies inadequate minimum flows, unsuitable water temperatures, and losses of juvenile salmonids at poorly screened diversion facilities as being among the major limiting factors affecting the anadromous fishery. With respect to providing adequate minimum flows, the AFRP technical report identifies several “potential solutions” including the following: (1) increasing minimum flow requirements to at least 700 cfs for October 1 through March 1 of all water years; (2) maintaining minimal flows of 1,000 cfs during April, 2,000 cfs during May, and 1,500 cfs during June of all water years; and (3) maintaining minimum flows of 450 cfs from July 1 to September 30 of all water years. (00EX1965-00EX1970.)¹⁵ The AFRP technical report on the Yuba River also acknowledges the problem of fish losses in the vicinity of the major water diversion facilities on the lower Yuba River (including the South Canal rock gabion fish screen) and recommends that the fish screens should be rebuilt to meet current DFG screening criteria. (00EX1974-00EX1977.)

The AFRP technical report on the Yuba River was not prepared as a regulatory proposal on behalf of YCWA or any other party. Rather, the report sought to identify factors that were limiting anadromous fish production in the watershed and to identify potential solutions for those problems. However, the report establishes that, contrary to statements of counsel for YCWA, major provisions of Decision 1644 (including the need for increased minimum flow requirements in the late spring) are supported by the previous recommendations of the very same experts who testified for YCWA in 2000 and in 2003. The opinion of those experts may have changed in some respects since 1995, but it is not accurate for YCWA to imply that the only significant evidence for the increased spring minimum flow requirements established in Decision 1644 was the “so-called professional judgment” of witnesses from DFG.¹⁶

¹⁵ Based on other evidence in the record and the SWRCB’s effort to balance competing uses, the minimum flow requirements established in Decision 1644 are often lower than the recommendations in the 1995 AFRP technical report.

¹⁶ In considering DFG recommendations regarding appropriate minimum flow requirements for the Yuba River, the SWRCB is mindful of the fact that the recommendations were prepared and transmitted to the SWRCB by DFG for consideration pursuant to the direction of Public Resources Code section 10002. In a situation with numerous lifestages and species of fish affected by many different factors, the professional judgment of qualified fishery biologists from DFG and elsewhere can be very valuable.

As discussed in section 3.2 below, counsel for YCWA now argues that recent data on fish captured at the Hallwood Boulevard Rotary Screw Trap (Hallwood RST) show that the increased minimum flows required by Decision 1644 during the late spring months are not necessary. YCWA's argument must be evaluated in light of the adequacy and reliability of this new evidence, and in the context of the entire evidentiary record. The evidentiary record includes the testimony and exhibits of DFG, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, YCWA's minimum flow proposal at the 2000 hearing, and the conclusion of YCWA's expert witnesses that the flows they recommended at that time would provide "substantial and demonstrable benefits" to the Yuba River fishery.¹⁷

3.0 THE DECLARATIONS AND TESTIMONY PRESENTED BY YCWA PROVIDE NO BASIS FOR REVISING THE REQUIREMENTS OF DECISION 1644

3.1 The Declaration and Testimony of William Mitchell Provide No Basis for Changing the Conclusions or Requirements of Decision 1644 Regarding Protection of Fish in the Lower Yuba River

The Court directed the SWRCB to consider the information in the declaration of Mr. William Mitchell regarding recent chinook salmon spawning data on the Yuba River. (2003-Staff 7.) In asking the Court to augment the administrative record to include Mr. Mitchell's declaration, counsel for YCWA argued that the weight of the evidence does not support the finding in Decision 1644 that overall populations of fall-run chinook salmon have not changed significantly since construction of New Bullards Bar Reservoir. (YCWA Memorandum of Points and Authorities in Support of Motion to Admit New Evidence of Petitioner Yuba County Water Agency, pp. 10 and 11, March 13, 2003, hereafter cited as YCWA memorandum.) Following the testimony of Mr. Mitchell at the hearing on June 5 and 6, 2003, counsel for YCWA and Browns Valley Irrigation District submitted a joint closing brief to the SWRCB that makes no mention of any alleged inconsistency between the findings of Decision 1644 and the recent data on salmon spawning discussed by Mr. Mitchell. Nonetheless, the findings below are presented pursuant to the Court's instructions to reconsider Decision 1644 in light of specified evidence, including the declaration of Mr. Mitchell.

¹⁷ As discussed above, the record establishes that the primary reason higher spring flows were not recommended for dry and critical years was that YCWA's flow proposal was limited by the amount of water that YCWA estimated would be available after meeting all predicted future offstream demands.

The testimony at the hearing highlighted several limitations or problems with the data presented in Mr. Mitchell's declaration. The first problem is that both the declaration and Exhibit D to the declaration refer to an "actual count" of chinook salmon that have returned to spawn in recent years. In response to questions at the hearing, however, Mr. Mitchell explained that YCWA's consultants had not actually counted all the salmon carcasses referred to in the declaration and attached exhibit. (2003-R.T. 153:1-153:10.) Rather, they developed a revised method of estimating the number of salmon that return to spawn that uses different assumptions than the method of estimating that was utilized by DFG prior to 1994. The new method is based on different assumptions regarding the proportion of returning salmon that spawn in different sections of the river and it includes a partial count of carcasses in an area for which the earlier method relied completely on estimates. (2003-R.T. 153:11-154:1.)

A second problem with the salmon spawning data discussed in the declaration and shown in the attached Exhibit C is that, although the estimates of spawning salmon in different time periods were derived using differing approaches, there is no explanation provided for the fact that the two methods of estimating provide considerably different results. Exhibit C to the Mitchell declaration shows the sources of salmon spawning data reported for the years listed in the table. However, Exhibit C does not explain that the method of estimating used since 1994 (except for 1995) shows a substantially higher number of returning fish each year than is shown for the same years using the previous method of estimating. (2003-Staff 4, Exhibit C.) That fact is evident from the graph attached as Exhibit D to the declaration, but is not acknowledged in either the declaration itself or the table attached as Exhibit C to the declaration. In comparing data on returning salmon to attempt to identify a trend over time, it is important to use the same method of estimating or at least to clearly account for the different methodologies.

Following questions during the hearing on June 5 and 6, 2003, regarding the different methods of estimating, YCWA presented a revised table that includes the data in Exhibit C to Mr. Mitchell's declaration. The revised table also includes estimates of salmon returning to spawn based on the original method of estimating for all years since construction of New Bullards Bar, as well as

numbers based on the revised estimation method that YCWA has used for 1994 and 1996-2002. (2003-YCWA-14.)

In arguing that the Mitchell declaration was significant new evidence, counsel for YCWA advised the Court:

“The pre-New Bullards Bar annual average of spawning fish was 12,906 fish, while the post New Bullards Bar annual average, including years 2000 through 2002 is 14,619 fish, using the same methodology for all years of record. (00EX3338; Mitchell Declaration paragraph 7, Exhibits C-D.) In fact, 14,852, 22,384, and 23,609 salmon spawned in 2000, 2001, and 2002, respectively.” (*Id.*, exhs. C-D.) (YCWA memorandum, p. 11.)

However, the YCWA memorandum did not advise the court that: (1) all the numbers referred to are based on estimates, rather than an actual count; and (2) the figures referred to for 2000-2002 are based on a different method of estimating than are the other numbers (despite the implication from the reference in the preceding sentence to use of the same methodology for all years of record). The revised method of estimation used to derive the numbers for 2000-2002 produced numbers substantially higher than the estimating method used for the pre-New Bullards Bar numbers.

The table that was submitted at the hearing on June 5 and 6, 2003, shows the estimates developed using the former method and the estimates for 1994 and 1996-2002 based on the revised method of estimating. (2003-YCWA-14.) The estimates for 2000-2002 using the former method were 12,162 in 2000, 16,541 in 2001, and 14,619 in 2002 for an average of 14,441 fish per year. The average of the numbers reported to the Court by YCWA for those three years based on the revised method of estimating would be 20,146 fish per year, or approximately 39.5 percent more than the average of the spawning salmon reported for 2000 through 2002 using the former method. Thus, the great majority of the reported increase in returning salmon for 2000 through 2002 over the pre-New Bullards Bar figures is due to the YCWA's change in the method of estimating rather than a change in the number of fish.¹⁸

¹⁸ In identifying the effect changing the method of estimating, the SWRCB does not mean to imply that the new method of estimating is not valid. However, if the pre-New Bullards Bar numbers of spawning salmon are to be compared with the numbers returning for the years 2000, 2001, and 2002 as was done by YCWA, it is important to understand and acknowledge the effect of the change in the method of estimating.

The difficulty in attempting to draw conclusions about trends in salmon populations from the available data on the Yuba River is compounded by the large annual variation in the number of returning salmon. In the 19 years listed as the pre-reservoir period, annual estimates of spawning salmon varied from a low of 1,000 to a high of 37,000. Similarly, in the 31-year post-reservoir period, annual estimates of spawning salmon have ranged from a low of 3,779 fish to a high of 39,367 fish. (2003-Staff 4, Exhibit C.) With such large yearly variations in the number of spawning salmon, it is difficult to draw any meaningful conclusions from just a few years' data. (2003-DFG 2, p. 1; 2003-R.T. 254:24-255:10.) DFG fishery biologist John Nelson testified that statistical analysis of the pre-New Bullards Bar data and the post-New Bullards Bar data (including the most recent three years) indicates that there is no significant difference between the two sets of data. (2003-R.T. 255:5-255:10.) As during the hearing in 2000, DFG presented testimony and exhibits showing that the average rate of increase in the fall-run population of chinook salmon prior to operation of New Bullards Bar was actually higher than the rate of increase in the post-project period. (2003- R.T. 255:3-255:16; 2003-R.T. 261:23-262:6; 2003-DFG 2, p. 3 and Figures 1 and 2.)

Mr. Mitchell testified that he did not attempt to evaluate the statistical significance of recent changes in Yuba River salmon populations. Mr. Mitchell's general conclusion, however, was that the population of chinook salmon on the lower Yuba River "have on average remained stable." (2003-R.T. 161:15-161:18.) That conclusion and the other evidence on salmon spawning during the years 2000-2002 are consistent with the finding in Decision 1644 that the record indicates that overall populations of fall-run chinook salmon have not changed significantly since construction of New Bullards Bar Reservoir. (Decision 1644, p. 46.) Thus, the Mitchell declaration provides no basis for revising the basic conclusions or findings of Decision 1644.

Finally, for purposes of determining appropriate minimum flow requirements, examining data on the estimated numbers of spawning salmon is of very limited value without correlating that data to the flows that were actually present in the river during critical lifestages of those fish. Average historic flows in the lower Yuba River have been substantially higher than the minimum

flow requirements established by that decision. (COM06004-COM06006.) Thus, the fact that fall-run chinook salmon populations appear to have done relatively well at the flow levels present following construction of New Bullard Bar does not refute the validity of or the need for the minimum flow requirements in Decision 1644.¹⁹ As water diversions increase to serve increasing demands for water in Yuba County and as incentives increase to vary flows to make water available for transfer to other areas, adequate minimum flow requirements are essential.

3.2 The Declaration and Testimony of Paul Bratovich Provide No Basis for Changing the Conclusions or Requirements of Decision 1644 Regarding Protection of Fish in the Lower Yuba River

The declaration of Mr. Paul M. Bratovich dated March 13, 2003, concerns data collected from the Hallwood RST that was used to trap and count juvenile chinook salmon and steelhead in the lower Yuba River. (2003-Staff 5.) The trap was located, approximately seven miles upstream of the confluence with the Feather River. Mr. Bratovich's declaration addresses data gathered during the following monitoring periods:

- (1) November 24, 1999, to July 1, 2000;
- (2) October 28, 2000, to October 28, 2001; and
- (3) October 21, 2001 to October 1, 2002.

The daily chinook salmon counts at the Hallwood RST for each of the three monitoring periods are shown on the graph attached as Figure 2 to the declaration and the daily steelhead counts for the Hallwood RST for each of the three monitoring periods are shown in the graph attached as Figure 3 to the declaration. Using the data collected at the Hallwood trap, Mr. Bratovich and his staff prepared "daily abundance indices" and "abundance index cumulative distributions" for downstream moving chinook salmon and steelhead. Based on the information in the abundance indices, Mr. Bratovich concluded:

"For the 1999/2000, 2000/2001 and 2001/2002 monitoring seasons, an estimated 98%, 99%, and 98% respectively, of the season's abundance index of juvenile

¹⁹ Similarly, in view of the fact that the historic flows have been much higher than the minimum flow requirements specified in the 1965 agreement between YCWA and DFG, the relative health of the Yuba River fishery in recent years does not establish that the 1965 agreement flows are adequate to protect the fish.

Chinook salmon moved downstream past the Hallwood RST before April 21. The temporal distributions of juvenile Chinook salmon abundance indices during these three monitoring seasons therefore are inconsistent with the D-1644 conclusion that high Yuba River flows are needed for juvenile Chinook salmon emigration between April 21 and June 30. In reality, almost all juvenile Chinook salmon downstream movement occurs before April 21.” (2003-Staff 5, p. 2.)

With respect to steelhead, the declaration concludes that the data show “most juvenile downstream movement occurs before April 21 or after June 30,” a condition that Mr. Bratovich concludes is “inconsistent with the D-1644 conclusion that high Yuba River flows are required during that period for juvenile salmonid emigration.” (2003-Staff 5, pp. 2 and 3.)

Testimony presented during the hearing on June 5 and 6, 2003, brought out several problems with relying on data from the Hallwood RST as a basis for revising the minimum instream-flow requirements established in Decision 1644. First, the Hallwood RST has not been tested or “calibrated” to determine the efficiency of the trap in capturing different sizes of juvenile salmonids at different flow rates. (2003-R.T.-164:20-165:3; 2003-DFG 2, p. 2.) Without calibrating the trap, there is no basis for concluding how the number of fish in the trap relate to the total number of fish in the river, and therefore, no basis for calculating the “abundance” of fish in the river at a particular time. (2003-DFG, p. 2.) Second, the testimony also indicates that the larger fish with higher chances of survival are the most likely to avoid the trap due to their better swimming ability. (2003-R.T. 191:15-192:2; 2003-DOI-1.) Third, the Hallwood RST is located seven miles upstream of the confluence of the Yuba River and the Feather River so the data from that trap provides no information about the presence and timing of chinook salmon and steelhead in the lower seven-mile reach of the Yuba River. (2003-R.T. 171:1-173:4.) Fourth, the Hallwood RST data is relevant only to outmigration of chinook salmon and steelhead; it is not relevant to the habitat and flow needs for other lifestages salmonids and other species such as American shad which are present in the Yuba River during the late spring period. Finally, the data from the Hallwood RST provides no basis for distinguishing between fall-run chinook salmon and spring-run chinook salmon which are subject to a higher level of protection due to their classification as threatened under the California Endangered Species Act and the federal Endangered Species Act. (See sections 4.4 and 4.5 of Decision 1644.)

Various problems that would be involved with relying upon the data from the Hallwood RST as a basis for revising Decision 1644 are summarized in the oral testimony presented by DFG fishery biologist Mr. John Nelson and in DFG's written rebuttal testimony prepared by biologists Mr. John Nelson and Mr. Ian Drury. (2003-R.T. 254:2-263:13; 2003-DFG-2.) That testimony explains that deriving meaningful numbers representing the number and timing of salmonids migrating out of the Yuba River would require RST efficiency testing at different flow rates for all species and sizes of the fish in question, as well as a multi-year effort that looks at all water year types and different flow regimes. (2003-DFG, p. 2.)

Decision 1644 identifies the primary fishery activities during the mid-April through June period as including:

- (1) spring-run chinook juvenile rearing and outmigration of young fish and adult upstream migration and holding (April through June);
- (2) fall and late-fall run chinook juvenile rearing and emigration (April through June);
- (3) steelhead egg incubation, juvenile rearing, and emigration (April through June); and
- (4) American shad upstream migration, spawning and early rearing (late April through June. (Decision 1644, p. 61)

In response to a question at the hearing, Mr. Bratovich agreed that all the activities cited above take place in the lower Yuba River in the time periods stated. (2003-R.T. 209:18-210:18.)

Pages 61 through 66 of the Decision 1644 discuss the April through June flows recommended by DFG and the similar flow recommendations in the AFRP technical report, a project on which Mr. Bratovich was involved. (00EX2737; 00RT0992-00RT0993.) In addition to assisting the downstream migration of chinook salmon, Decision 1644 cites evidence that the flows required during the mid-April through June period would assist the upstream migration of spring-run chinook salmon and would provide attraction flows to encourage the upstream migration of American shad into the Yuba River. (Decision 1644, pp. 62-64.)

During the hearing in 2000, the National Marine Fisheries Service recommended a study of the timing of juvenile salmonid emigration and flow needs for the period of April 1 to June 30. The recommended study would include variable spring flows for a period of 10 years with

investigation of downstream fish movement and other factors during that period. (Decision 1644, p. 62, citing S-NMFS 1A, pp. 6-7; S-R.T. 126:9-126:25.) The NMFS study recommendation confirms that information on the downstream movement of salmon and steelhead is a relevant consideration in determining desirable instream flows.

However, the testimony presented by DFG regarding the uncalibrated Hallwood RST establishes that there is a high degree of uncertainty about the validity and usefulness of the limited data that has been collected to date. The evidence in the record discussed above and the rebuttal testimony of DFG establish that the Hallwood RST data do not provide a sufficient basis for revision of minimum flow requirements specified in Decision 1644. (2003-DFG 2.)

In his testimony on July 5, 2003, Mr. Bratovich stated:

“I think that the current efforts of Yuba County Water Agency, National Marine Fisheries, NOAA, Fish and Wildlife Service, and Fish and Game to design and implement monitoring studies such as these and full evaluation of the variety of stressors that potentially affect this time period and these life stages should continue to be explored and addressed in order to consider changing D-1644.” (2003-R.T. 216:10-216:18, emphasis added.)

In response to further questions, Mr. Bratovich confirmed his belief that the work of various agencies he referred to should be completed in order to develop any different flow requirements than are in Decision 1644. (2003-R.T. 216:19-218:8.)

In establishing minimum flow requirements and other measures to protect fishery resources in the Yuba River, Decision 1644 addressed numerous factors relative to various lifestages of several species of fish, as well as the relationship between desirable fishery protection measures and other uses of water. As discussed in section 2.2 above, YCWA’s own flow proposal presented at the 2000 hearing emphasized the need to consider numerous factors including flow-habitat relationships, flow-temperature relationships, flow migration relationships for anadromous salmonids, and the instream flow and temperature needs of salmonids and other fish species. (S-YCWA-19, p. 2-8; 00EX3325.)

As would be expected, additional data have been collected since Decision 1644 was entered in 2001, including the Hallwood RST data discussed by Mr. Bratovich. The record establishes that the Hallwood RST data are subject to a number of limitations and to differing interpretations by the fishery biologists who testified. None of the expert witnesses on fishery issues concluded that the limited new information referred to by YCWA justifies revision of the flow requirements in Decision 1644. To the contrary, two biologists from DFG testified about the problems with relying on the RST data, and Mr. Bratovich himself recommends completion of ongoing work involving YCWA and several resource management agencies before considering revision of Decision 1644.²⁰

3.3 The Declaration and Testimony of Curt Aiken Provide No Basis for Changing the Conclusions or Requirements of Decision 1644 Regarding Protection of Fish in the Lower Yuba River

The declaration of YCWA General Manager Curt Aiken addresses actions taken by YCWA to deliver or to prepare for delivery of water to the Dry Creek Mutual Water Company (Dry Creek) and to the Wheatland Water District (Wheatland). (2003-Staff 6, pp. 1 and 2.) Mr. Aiken's declaration states that YCWA's water deliveries to Dry Creek were 8,809 acre-feet in 2000, 3,134 acre-feet in 2001, and 6,153 acre-feet in 2002. In addition, the declaration states that Dry Creek participated in a groundwater in-lieu transfer program with the Department of Water Resources in 2001 and 2002. As part of that program, water users in the Dry Creek area pumped 9,160 acre-feet and 5,876 acre-feet of groundwater in 2001 and 2002, respectively, in lieu of receiving surface water deliveries from YCWA. Mr. Aiken testified that the current demand for surface water from the Yuba River for use in the Dry Creek area is approximately 12,000 acre-feet per year and that the water distribution system is being expanded. Mr. Aiken testified that, over the next few years, he expects the Dry Creek area's demand for water from the Yuba River to increase to 16,470 acre-feet. (2003-R.T. 124:12-125:8.)

With respect to Wheatland, the declaration states that the Department of Water Resources has notified YCWA that it will provide a grant for \$3,150,000 to fund part of a water development

²⁰ In the event future evidence is developed justifying revision of Decision 1644, the SWRCB can consider such revision in the exercise of its continuing authority under the public trust doctrine and article 10, section 2 of the California Constitution.

project to deliver water to Wheatland. At present, there are no canals from YCWA's existing main canal to the Wheatland Water District territory, but a connection to Wheatland is under design and planning. (2003-R.T. 150:3-150:7.) YCWA is in the process of negotiating a contract to serve the Wheatland area, but no contract is currently in effect. (2003-R.T. 152:18-153:6.)

Mr. Aiken testified that the draft contract that is being negotiated with Wheatland includes a "shortage provision" and provides that YCWA will comply with all applicable state and federal regulatory requirements in making deliveries of water to customers in Yuba County. (2003-R.T. 174:22-176:21.) The "shortage provision" referred to at the hearing allows YCWA to deliver less water than requested under the contract when it is unable to do so due water supply conditions and the need to comply with applicable regulatory requirements. Mr. Aiken also confirmed that the contract with Wheatland will proceed regardless of what happens with the instream flow requirements established by SWRCB. (2003-R.T. 173:22-175:21.) In effect, the parties to the draft contract assume that continuation of the flow requirements established by Decision 1644 would not substantially interfere with the purposes of the contract.

When asked if any of the surface water from the Yuba River would be used directly for groundwater recharge purposes in the Wheatland area, Mr. Aiken explained that there are ongoing discussions about a groundwater recharge area, but that no formal decision has been made. The testimony also reflects that YCWA is uncertain if the proposed groundwater recharge is listed as an authorized purpose of use in YCWA's water right permits. (2003-R.T. 225:9-226:15.) In the event that YCWA decides to proceed with a project that will involve diversion of surface water for groundwater recharge purposes, it will need to submit a change petition to the SWRCB and provide the information required pursuant to California Administrative Code, title 23, section 733. Mr. Aiken testified that YCWA has not actually signed a grant contract with the Department of Water Resources and that it will take some time to get the funds in hand. (2003-R.T. 207:9-207:18.) YCWA's grant proposal filed with the Department of Water Resources proposes to deliver between 36,000 and 37,000 acre-feet to the Wheatland area. (2003-R.T. 229:8-229:15.)

Overall, Mr. Aiken's testimony establishes that YCWA's water demand is continuing to grow. If the projected demands for Dry Creek and Wheatland occur as presently predicted, then the demand for additional irrigation deliveries to the Dry Creek area will increase to 16,470 acre-feet and the demands for deliveries to the Wheatland area will increase to approximately 36,000 to 37,000 acre-feet.

In evaluating the feasibility of adopting the minimum flow requirements in Decision 1644, the SWRCB considered the effects of the flow requirements on water demands for other uses. In conducting this analysis, the SWRCB used the operations model developed by YCWA's consultants, Yuba River Basin hydrologic data for a 71-year period of record, and an estimated annual present level of demand for offstream uses of 273,847 acre-feet per annum. (Decision 1644, pp. 111-133.) YCWA argued that the evaluation of the effects of the instream flow requirements should be based upon its estimated future level of demand at full development which it asserted would be 375,688 acre-feet per year for normal and wet years and 381,936 acre-feet per year for dry critical and below normal water years. (Decision 1644, pp. 104 and 105.) Decision 1644 reviewed the history of YCWA's prior estimates of future demand and the fact that YCWA's prior projections of future demand had not proven to be reliable. (Decision 1644, pp. 104-107.) Rather than utilizing speculative numbers regarding future events, Decision 1644 stated:

“In evaluating the feasibility of the instream flow requirements established in this decision, we conclude it is more reasonable to use the water demand figure described in Section 7.3 below based on recent historical water use and a reasonable allocation for waterfowl habitat.

“The SWRCB recognizes that there will be new uses of water in Yuba County in the future, but we believe that a large portion of those uses can be met through more efficient use of existing water supplies or with water from other sources. [footnote citing a 1990 report prepared for YCWA that identified alternatives for meeting future water demands.]” (Decision 1644, pp. 106 and 107.)

Decision 1644 also includes findings regarding alternatives for meeting increased future water demand including more efficient irrigation techniques, reuse of water drained from rice fields, replacement of unlined canals, and implementation of an expanded groundwater conjunctive use program. (Decision 1644, pp. 108-110, 124-125.)

With respect to the increasing demand for water in the Wheatland and Dry Creek areas, Decision 1644 stated:

“YCWA’s comments on the Draft Decision dated November 7, 2000, stress YCWA’s intentions to provide 16,743 acre-feet of water annually to the Dry Creek Mutual Water Company and to provide 40,855 acre-feet of water annually to Wheatland Water District and the Wheatland Water District Detachments. Section 8.4 of this decision discusses the procedure by which YCWA can request a temporary modification of applicable instream flow requirements if the projected deficiencies of surface water deliveries for offstream uses in a specific year exceed 20 percent of the projected demand for that year. The criteria for determining YCWA’s overall “projected demand” for a particular year include provisions for estimating the projected water demand for use in the Dry Creek and Wheatland areas. The record remains unclear as to when and if the projected demands for surface water in the Wheatland and Dry Creek areas will be reached. However, under the provision discussed in Section 8.4, YCWA may request temporary modification of the instream flow requirements in years in which YCWA would be unable to meet 80 percent of its overall demand, including the projected demands in a specific year in the Wheatland and Dry Creek areas.” (Decision 1644, p. 107.)

In recognition that there will be years in which deficient supplies may result in significant shortages of water for consumptive uses, even with the reduced instream flow requirements that apply in dry, critical, and extreme critical years, Decision 1644 includes a “deficiency clause” provision. The deficiency clause allows YCWA to seek a temporary reduction in the minimum flow requirements that would otherwise apply. The deficiency clause includes criteria governing calculation of YCWA’s projected demand for any year in which it requests a reduction in minimum flows. The procedure for calculation of projected future water demands specifically provides for inclusion of projected actual demands in a specific year of up to 16,743 acre-feet to serve Dry Creek Mutual Water Company and up to 40,855 acre-feet to serve the Wheatland area. (Decision 1644, pp. 130-132, 180-182.)

In summary, YCWA estimated that its future annual water demand would exceed the present level of demand figure that the SWRCB used for modeling purposes by more than 100,000 acre-feet. Following the close of the SWRCB hearing in 2000, YCWA has delivered up to 8,809 acre-feet to the Dry Creek area, it estimates that the present demand for surface water in the Dry Creek area is approximately 12,000 acre-feet, and it believes that its future demand in

the Dry Creek area will be over 16,000 acre-feet per year within a few years. In addition, YCWA has received preliminary approval of a grant application from the Department of Water Resources to build facilities to deliver approximately 36,000 to 37,000 acre-feet of water per year to the Wheatland area. If the development in Dry Creek and Wheatland proceed as YCWA expects, that would account for approximately one-half of the difference between the present level of demand used in Decision 1644 and the estimated future level of demand that YCWA suggested should be used for modeling purposes. Mr. Aiken's declaration does not discuss the status of other potential demands that would result in increasing YCWA's demand for water to the future demand level YCWA presented at the 2000 hearing.

None of the information presented in Mr. Aiken's declaration is inconsistent with the findings of Decision 1644. To the contrary, Decision 1644 recognized that additional water demands were likely to occur in the Dry Creek and Wheatland areas. Decision 1644 also specifically included the water demands for those areas in the deficiency clause provisions that will apply in the event of future conditions indicating that YCWA would experience a shortage in excess of 20 percent of projected offstream water demands. Although the evidence in the Aiken declaration is consistent with the findings in Decision 1644, two minor clarifications of the wording regarding the findings in section 7.2 of Decision 1644 as set forth in the last portion of this order may help reduce the potential for confusion or disputes regarding those findings.

4.0 THE CALIFORNIA ENERGY COMMISSION REPORT SUBMITTED BY SYRCL PROVIDES AN INSUFFICIENT BASIS FOR REVISION OF DECISION 1644

Section 8.3.2 of Decision 1644 discusses the relationship between the long-term minimum flow requirements established in the decision and the production of hydroelectric power. The long-term flow requirements would have minimal impacts on the total generation of hydroelectric power. However, under the modeling assumptions used in developing Decision 1644, the long-term flow requirements could result in increased power production in April, May, and June and reduced power production in July, August, and September compared to what would occur under the minimum flow proposal presented by YCWA in 2000. (Decision 1644, Appendix 4.)

Decision 1644 notes that strict compliance with the terms of YCWA's Power Purchase Agreement with Pacific Gas and Electric Company could result in a similar shift in the timing of power production and that, historically, New Bullards Bar Reservoir has not been operated to maximize power production during periods of peak demand at the expense of other uses of water. Nevertheless, in view of the unprecedented electrical energy crisis that existed in early 2001, and the need to maintain flexibility in powerplant operations to avoid serious electricity shortages, Decision 1644 adopted a phased approach toward compliance with the long-term minimum flow requirements applicable to the lower Yuba River.²¹ For approximately the first five years, or until April 21, 2006, Decision 1644, established interim flow requirements that are largely based on YCWA's 2000 minimum flow proposal, except as modified to avoid reducing flows below the minimums previously required under the 1965 agreement with DFG. (Decision 1644, pp. 126 and 127.) Beginning April 21, 2006, the long-term flow requirements specified in Decision 1644 come into effect.

In view of the relative improvement in the electrical energy supply situation since early 2001, SYRCL requests that the interim flow provisions in Decision 1644 be eliminated and that the long-term minimum flow requirements become effective immediately. In support of that request, SYRCL cites a report of the California Energy Commission (CEC) to the California Senate Energy Committee on January 28, 2003, titled "California's Electricity Supply and Demand Balance Over the Next Five Years." The CEC report predicts a 9 percent operating reserve during the critical months of July, August, and September of 2003, which would increase to a 15 percent reserve if expected spot market purchases are included. The report also concludes that the current assessment of electricity demand and supply looks promising through 2004. (2003-Staff 7, p. 1.) SYRCL provided testimony by CEC staff member Mr. David Ashuckian who verified the content of the CEC report and responded to questions on cross-examination.

YCWA introduced other documents from the CEC and California's Independent System Operator that provide additional information regarding California's ongoing electrical energy

²¹ Decision 1644 took official notice of the fact that on January 17, 2001, Governor Davis proclaimed a State of Emergency to exist due to the energy shortage in California. (Decision 1644, p. 127.)

supply problems. YCWA also introduced testimony of Dr. Lon House, an expert witness on hydroelectric energy production. Dr. House discussed the importance of the Colgate Powerhouse as a generating resource that could produce varying amounts of power as needed, but his testimony did not address the effects that different proposed minimum flow requirements on the Yuba River may have on the statewide energy supply situation.

Based on hydrology for the 71-year period of record considered, approximately 75 percent of the water years in the Yuba River Basin would be classified as wet, above normal, or below normal under the criteria adopted in D-1644. (Decision 1644, p. 120.) The interim flows and the long-term flow requirements established in Decision 1644 are the same or virtually the same for wet, above normal, and below normal years. Only in the 25 percent of years classified as dry, critical, or extreme critical years do the flow requirements vary substantially. The present water year already has been classified as an above normal water year. Therefore, the debate over retaining the interim flows effectively concerns only water years 2004 and 2005. Based on the 71-year hydrologic record utilized in Decision 1644, eliminating the interim flow provisions and applying the long-term flow requirements immediately would be expected to make a difference about 25 percent of the time, or in one of four years. In view of the fact that there are only two water years remaining that may be subject to the interim flow provisions of Decision 1644, the significance of eliminating the interim flow provision at this time is substantially reduced.

The long-term flow requirements established in Decision 1644 are directed at preserving and promoting the long-term health of the Yuba River fishery rather than addressing a short-term problem. The CEC report presented by SYRCL indicates that the energy crisis conditions of 2001 have improved significantly. However, that report and other evidence offered by YCWA indicate that there is still uncertainty about electrical energy supplies. Overall, the evidence presented on the electrical energy supply situation was not sufficiently certain or convincing to justify elimination of the interim flows or to make other revisions in implementing the specified long-term minimum flow requirements in accordance with the phased approach established in Decision 1644.

5.0 ALL PARTIES HAVE BEEN ACCORDED DUE PROCESS IN THE STATE BOARD PROCEEDINGS LEADING TO DECISION 1644 AS ADOPTED ON MARCH 1, 2001, AND IN THE PROCEEDINGS LEADING TO ADOPTION OF REVISED DECISION 1644

5.1 Law Regarding Prevention of Bias and Right to a Fair Hearing

YCWA alleges that it was denied a fair hearing in the proceeding leading to Decision 1644. YCWA's allegations regarding lack of a fair hearing do not focus on actions of SWRCB Board Members who conducted the hearing and who adopted Decision 1644. Rather, YCWA alleges that previous work or volunteer activity of SWRCB employees who assisted with some aspects of the proceeding resulted in those staff members having a bias that prevented YCWA from having a fair hearing. The Yuba County Superior Court directed the SWRCB to reconsider Decision 1644 in light of YCWA's "fair hearing allegations," and to consider the information provided in depositions of the three employees or to consider live testimony from those individuals.

Generally, the statutes and court decisions addressing fair hearings before an administrative agency focus on the actions of the decision-maker or a hearing officer. Adjudicative proceedings before the SWRCB are subject to the administrative adjudication provisions of the Administrative Procedure Act set forth in chapter 4.5 of part 1 of division 3 of the Government Code. With regard to the subject of alleged bias due to a hearing officer's specialized knowledge or previously expressed views, the law is clear that previous work experience in an area or previously expressed views on an issue to be addressed in the proceeding are not a basis for disqualification of the hearing officer due to bias or prejudice. Subdivision (b) of Government Code section 11425.40 provides:

“(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer: . . . [¶]

(2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.”

Subdivision (c) of section 11425.40 provides that the provisions of section 11425.40 governing disqualification of a presiding officer also govern disqualification of the agency head or other person or body to which the power to hear or decide in a proceeding is delegated. The SWRCB

discussed issues involving the Yuba River fishery with staff, but adoption of the decision was not a delegated function. The SWRCB adopted Decision 1644 at a public meeting on March 1, 2002. If previous experience and previously expressed views regarding a disputed issue are not sufficient grounds for disqualification of a presiding officer, then it is apparent that a party is not denied a fair hearing solely because the staff assisting with the proceeding may have previous experience or previously expressed views regarding the matters at issue.

YCWA's closing brief in this proceeding cites *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App. 4th 81, as an example of an instance in which bias by staff not serving as a hearing officer was held to result in a denial of due process. In that case, the court held that the rights of a party who appealed from the denial of a regulatory permit were violated by the fact that the city's hearing officer for the appeal announced that, due to his own inexperience, he was being advised by the same city attorney who had initially advocated on behalf of the city that the permit be denied. That case is clearly distinguishable from the present proceeding. The SWRCB proceedings leading to Decision 1644 were not part of an appeal process from a previous regulatory action taken against YCWA or other parties. In the Decision 1644 proceedings, the staff involved worked with the SWRCB in reviewing the hearing record, but did not participate in an advocacy role in support of any particular action during the course of the administrative adjudication proceedings.

Although the SWRCB employees referred to by YCWA did not conduct the hearing and were not the decision-maker, it is nevertheless instructive to examine the leading California Supreme Court decision regarding disqualification of an administrative law officer on the grounds of bias. In *Andrews v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 781, the court held that an attorney's prior work for a public interest law firm representing farm workers in employment discrimination suits did not disqualify the attorney from conducting a hearing as a temporary administrative law officer in a proceeding under the Agricultural Labor Relations Act. In addressing the distinction between bias and having knowledge of the subject matter under consideration, the court stated:

“The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him.

As stated in *Evan v. Superior Court* (1930) *supra*, 107 Cal.App. 372, 380, the word bias refers to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.” (*Id.* at 790.)

In order to establish bias, the court said:

“A party must allege concrete facts that demonstrate the challenged judicial office is contaminated with bias or prejudice. ‘Bias and prejudice are never implied and must be established by clear averments (*Shakin v. Board of Medical Examiners* (1967) 254 Cal.App.2d 102, 117.) Indeed, a party’s unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals.” (*Id.* at 792, emphasis added.)

With reference to disqualification of a judge, the court said:

“our courts have never required the disqualification of a judge unless the moving party has been able to demonstrate concretely the actual existence of biases. [footnote omitted] We cannot now exchange this established principle for one as vague, unmanageable, and laden with potential mischief as an ‘appearance of bias’ standard. . . .” (*Id.* at 793.)

With respect to bias by those participating in hearings before administrative agencies, the court said:

“The foregoing considerations, of course, are equally applicable to the disqualification of a judicial officer in the administrative system. Indeed, the appearance of bias standard may be particularly untenable in certain administrative settings. For example, in an unfair labor practice proceeding, the Board is the ultimate fact finder, not the ALO. [citations omitted] We therefore fail to see how a mere subjective belief in the ALO’s appearance of bias, as distinguished from actual bias, can prejudice either party when the Board is responsible for making factual determinations upon an independent review of the record.” (*Id.* at 794.)

In the present proceeding, the depositions of the two former employees and one current employee of the SWRCB are discussed in sections 5.2 through 5.5 below. Those depositions and the record as a whole provide no support whatsoever for arguing that the three employees were

biased against YCWA, much less that Decision 1644 was the result of SWRCB employee bias. To the contrary, the record shows that YCWA and all other parties were afforded a fair hearing, both in the lengthy proceedings leading to adoption of Decision 1644 and in the additional proceedings leading to adoption of this order.

5.2 Participation of Mike Mainz in SWRCB Proceeding

Counsel for YCWA and some of the districts receiving water from YCWA suggest they were denied due process of law in the process leading to adoption of Decision 1644 in 2001 due to the fact that former SWRCB fishery biologist Mike Mainz worked on Yuba River fishery matters while employed by DFG in the 1980s. YCWA's memorandum of points and authorities filed with the Yuba County Superior Court states:

“Yuba contends that Mr. Mainz's participation in the 1992 hearing denied Yuba a fair hearing because Mr. Mainz, as a [former] DFG employee, had helped prepare the DFG Plan, which was the primary subject of the Board's hearing.” (YCWA memorandum, p. 5.)

In considering YCWA's allegations regarding Mr. Mainz' work with DFG, it is important to distinguish between the DFG Plan and information provided by various other studies that were used in developing the DFG Plan. The DFG Plan utilized information from a variety of sources to reach conclusions and make recommendations about protection of fish in the lower Yuba River. The information considered by DFG included data on the amount of fishery habitat for different lifestages of different species of fish at various levels of flow. The information on the relationship between flow and habitat was developed by Beak Consultants using an Instream Flow Incremental Methodology /Physical Habitat Simulation Model study (IFIM/PHABSIM or IFIM study). (Decision 1644, p. 49, 92EX0373.)

During prior employment with DFG, which ended approximately three years before the 1992 SWRCB hearing, Mr. Mainz prepared the request for fishery consultants to submit bids to do technical work for the IFIM study. (92RT0029.) Mr. Mainz testified in his deposition that he helped set up the IFIM study of the Yuba River and assisted in selecting appropriate locations for transects of the river where the relationship between flow and habitat would be evaluated. Mr. Mainz also testified that he “did not look at or analyze the data” developed in the IFIM study and

that he did not write the DFG Plan. (2003-Staff 1, pp. 37 and 38.) In response to questions about his role in preparing the DFG Plan, Mr. Mainz stated: “The only time that I got involved that I recall was in going out with the modelers and setting up the IFIM sites.” (2003-Staff 1, p. 35, emphasis added.)²²

Thus, the record establishes that, during the time Mr. Mainz worked at DFG, his involvement with the DFG Plan was limited to arranging for a consultant to conduct an IFIM study, helping the consultant select sites for the study, and other preliminary matters. The fishery habitat data developed through the IFIM study was utilized by DFG, YCWA, and other parties and has not been a major subject of dispute.²³ In fact, Mr. Paul Bratovich, who was called as an expert witness for YCWA in the June 5 and 6, 2003, hearing is one of the fishery biologists who conducted the IFIM study for DFG while Mr. Bratovich was employed by Beak Consultants. (00EX2740.)²⁴ The IFIM data developed by Beak Consultants was later utilized by DFG in preparing the Fisheries Management Plan, but Mr. Mainz was not involved in that process. Mr. Mainz had no further involvement with respect to the DFG Plan until several years later when, as an employee of the SWRCB, he was asked to review and comment on the DFG Plan on behalf of the SWRCB.²⁵

²² The deposition transcript indicates that in responding to a question that he believed was about the Yuba River, Mr. Mainz described his limited role in working with the modeling consultant who did the IFIM/PHABSIM study on the Yuba River. Counsel for YCWA was actually inquiring about Mr. Mainz’ work on the Mokelumne River. Once the question was clarified, Mr. Mainz explained that his role in the studies that were done on both rivers was similar. (2003-Staff 1, pp. 35-38.)

²³ Decision 1644 discusses YCWA’s criticism of the way that DFG used the IFIM study results and YCWA’s observation that the IFIM data showed that providing different levels of flow above and below Daguerre Point Dam would actually maximize habitat for some life stages of salmon. However, YCWA’s analysis of the amount of fish habitat available at different levels of flow was essentially the same as shown in the DFG’s analysis. (Decision 1644, pp. 52 and 53.)

²⁴ As discussed in section 5.3 below, the record in this proceeding shows that many of the fishery biologists who testified on behalf of various parties have had extensive employment or contracts with various governmental agencies. The record discussed above shows that the only work that Mr. Mainz did regarding the DFG Plan while employed by DFG was helping arrange for Beak Consultants to do the IFIM study and assisting the Beak Consultants employees in setting up the IFIM study sites.

²⁵ While working as a biologist with the SWRCB, Mr. Mainz prepared written comments on the draft Fisheries Management Plan in October of 1990. SWRCB Order 2001-08 discussed Mr. Mainz’s written comments on the DFG Plan and concluded that there was no basis for disqualifying Mr. Mainz from assisting in the proceeding due to previously expressed views on an issue related to the proceeding. (SWRCB Order 2001-08, p. 20, citing Gov. Code § 11425.40, subd. (a) (2).) As a state agency with regulatory responsibility over water resources, the SWRCB is often asked to comment on studies of local, state, and federal agencies on matters related to water resources.

Mr. Mainz' testimony establishes that, following conclusion of the 1992 hearing, he was one of six other named SWRCB employees involved in preparing a draft staff analysis of the hearing record and that there were other people involved whose names he could not remember. (2003-Staff 1, pp. 24:11-25:1.) YCWA's memorandum of points and authorities dated March 13, 2002, advised the Court that:

“Mr. Mainz also testified that he was primarily responsible for preparing the stream flow analysis and instream-flow recommendations in the Board's 1994 staff report, which was the basis for the Board's 1996 draft decision, which was the basis for substantial parts of D-1644. (Meinz Depo., pp. 24-30: COR1391-1392.)”

In fact, however, the deposition transcript shows that when asked by counsel for YCWA to describe the sections of the staff analysis that he was “the primary responsible person for writing,” he responded:

“I don't know if I consider myself the primary, so I am not sure that I agree with that language.” (2003-Staff 1, pp. 26 and 27.)

When asked to elaborate, Mr. Mainz described a process in which he wrote the initial drafts of some of the sections, but that the final draft was the product of a committee in which Mr. Ed Dito (another SWRCB employee) was the person with overall responsibility for editing. With respect to the streamflow recommendations in the 1994 staff analysis, Mr. Mainz testified in 2002, that he could not recall which ones he specifically prepared. (2003-Staff 1, pp. 28 and 29.) Mr. Mainz left employment with the SWRCB in January 1994, approximately six months prior to completion of the July 1994 staff analysis of the 1992 hearing record and six months prior to the July 21, 1994 date of a partial draft water right decision referred to by counsel for YCWA. Mr. Mainz indicated that although he had probably seen a draft water right decision dated April 28, 1996, he could not recall if he had ever read it. (2003-Staff 1, pp. 23-25, 30-33.)²⁶ Mr. Mainz returned to work for the SWRCB from 1996 to 2001, but he did not work on the Yuba River at all during that period. (2003-Staff 1, p. 19.)

²⁶ The corrections to Mr. Mainz' deposition clarify that his involvement with any of the SWRCB documents or draft documents produced after the 1992 hearing was limited to helping author the draft staff analysis. (2003-Staff 1, pp. 31-33 and corrections to page 31.)

Although the IFIM data developed by Beak Consultants was used in developing the recommendations in the DFG Plan, Mr. Mainz was not involved in that process. There is no basis for concluding that Mr. Mainz was biased in favor of the recommendations in the DFG Plan. Similarly, there is no evidence in the record that Mr. Mainz held any bias against YCWA or any other party.²⁷ Even if there were evidence of bias on the part of Mr. Mainz, which there is not, the record falls far short of establishing how any such bias would have resulted in a denial of due process to YCWA or others. The SWRCB adopted Decision 1644 over seven years after Mr. Mainz left in 1994, following distribution of a draft decision prepared in 1996, 13 additional days of evidentiary hearing in 2000, extensive legal briefing, and the SWRCB's consideration of over 500 comments on draft decisions dated November 7, 2000, and February 16, 2001.

Decision 1644 includes significant revisions to prior draft decisions based on the SWRCB's review of the evidence and consideration of extensive comments on prior drafts. As discussed in section 2.2 above, the minimum flow requirements established in Decision 1644 are the same or very similar to the minimum flow requirements recommended by YCWA in 2000 for all but dry, critical, and extreme critical years. The Decision 1644 minimum flow requirements are substantially lower than the flows recommended in the 1994 staff analysis to which Mr. Mainz contributed and Decision 1644 does not establish maximum water temperature limits as recommended in the 1994 staff analysis. The major differences between the minimum instream-flow requirements proposed by YCWA 2000 and the flow requirements adopted in Decision 1644 in 2001 are due to the SWRCB's conclusion that the burden of water shortages in dry, critical, and extreme critical years should be balanced among competing uses rather than imposed solely on instream uses. (See section 2.2 above.) That conclusion has nothing to do with Mr. Mainz' employment with DFG in the 1980s.

Although the subject is not addressed in Mr. Mainz' deposition, counsel for South Yuba Water District and Cordua Irrigation District expressed concern at the hearing about documents in the

²⁷ In fact, as discussed on page 21 of Order WR 2001-08, SWRCB files show that, in litigation involving a temporary transfer of water by YCWA, Mr. Mainz filed a declaration opposing issuance of a preliminary injunction against YCWA. (*California Sportfishing Protection Alliance v. State Water Resources Control Board*, Sacramento County Superior Court No. 368341, Declaration of Mike Mainz, dated December 11, 1991.)

administrative record regarding a study of fish losses near the rock gabion fish screen at the South Canal diversion facilities. (2003-R.T. 340:16-344:16.) Based on evidence from several sources, Decision 1644 concluded that diversion of water at the South Canal is resulting in reasonably avoidable adverse impacts on fish, and that continuing those diversions without reducing the loss of fish would be an unreasonable method of diversion. (Decision 1644, pp. 92-96.) Therefore, Decision 1644 directed YCWA and the parties receiving water through the South Canal diversion facilities to prepare a plan to reduce loss of fish at the South Canal diversion facilities following consultation with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and DFG. (Decision 1644, pp. 179, 180, 184, 185, 187-189.)

At the hearing on June 6, 2003, attorney Mr. Paul Minasian personally testified about his concerns regarding a 1988 memorandum in the administrative record which indicates that, while working at DFG, Mr. Mainz drafted an outline for a study of fish losses near the South Canal. The draft outline did not reach any conclusions or make any recommendations regarding fish losses. (COR0599-COR0605.)²⁸ The actual study of fish losses near the South Canal was later conducted by DFG fishery biologist Ms. Deborah Konoff with the help of staff from various agencies. The November 18, 1988, memorandum summarizing the results of the study indicates that copies were provided to the SWRCB, Brophy Water District, and South Yuba Water District. (COR0663-COR0672.) During the hearing on June 6, 2003, Mr. Minasian objected to the fact that he was not informed during the hearing in 1992 that Mr. Mainz designed the DFG study for evaluating fish loss at the rock gabion fish screen. (2003-R.T. 341:2-342:8.)

The evidence of fish losses at the South Canal including the 1988 DFG study, was discussed at length during the hearing in 1992 and is summarized on pages 92 through 96 of Decision 1644. In 1992, Mr. Minasian cross-examined the DFG staff regarding the 1988 study and presented rebuttal testimony from a biologist who disagreed with some aspects of the study. The fact

²⁸ The memorandum that Mr. Minasian refers to has been in the SWRCB's files since 1988 and was included as part of the staff exhibits admitted into evidence in 1992. The memorandum was also included in the administrative record filed with the Yuba County Superior Court in August 2002 as part of the consolidated litigation involving Decision 1644. Prior to June 6, 2003, Mr. Minasian had not previously raised any concern about the draft outline that Mr. Mainz prepared for the DFG fish loss study.

Mr. Mainz drafted an outline for the study while employed by DFG does not affect the evidentiary value of the study, nor does it prejudice any party to the hearing.

Most importantly, with respect to the conclusions and requirements of Decision 1644 regarding fish losses at the South Canal diversion facilities, the DFG study was simply duplicative evidence of facts established elsewhere in the record. Decision 1644 cites evidence from several other sources that overwhelmingly support the SWRCB's conclusion that "the continuing diversion of water from the Yuba River through existing facilities at the South Canal has reasonably avoidable adverse impacts on anadromous fish in the Yuba River." (Decision 1644, pp. 92-96.)²⁹ There was nothing inappropriate about the SWRCB considering the DFG study of fish losses at the South Canal diversion facilities and our basic conclusions about fish losses at the South Canal remain the same with or without consideration of the DFG study. Deleting references to the DFG South Canal fish loss study from the decision adopted by this order, however, may help avoid unnecessary and irrelevant controversy regarding the basis for our conclusions. Therefore, among the revisions to Decision 1644 specified in this order is the deletion of several references to the DFG study of fish losses at the South Canal.

The fishery protection measures established by Decision 1644 were determined by the SWRCB based on review of the record and the SWRCB Board Members' determination of how best to equitably serve competing demands for water during times of shortage in accordance with applicable legal requirements. Although Mr. Mainz assisted during the hearing in 1992 and in reviewing the evidentiary record prior to his departure from the SWRCB in 1994, he was only one of numerous staff assigned to an ongoing project over many years. There is nothing in the record that establishes any bias whatsoever on the part of Mr. Mainz with respect to the issues considered in Decision 1644, or the parties involved in the SWRCB proceedings. Similarly, there is no basis for asserting that any party was denied due process due to Mr. Mainz' prior employment by DFG more than a decade before Decision 1644 was adopted. None of the

²⁹ In addition to the numerous citations to the record in Decision 1644, we note that a 1995 report prepared for the U.S. Fish and Wildlife Service recommended that all water diversions on the lower Yuba River should be evaluated for fish losses and screened according to current DFG criteria. The listed author of that portion of the report is fishery biologist Paul Bratovich who testified on behalf of YCWA. (00EX1370, 00EX1371, 00EX1955.)

present SWRCB Board Members have ever discussed matters related to the Yuba River fishery or Decision 1644 with Mr. Meinz.

5.3 Participation of Alice Low in SWRCB Proceeding

Fishery biologist Ms. Alice Low assisted the SWRCB as a staff environmental specialist during the evidentiary hearing in 2000 and helped review the record following the hearing. Almost seven months after the hearing, the SWRCB received a letter from Mr. Minasian regarding a 1993 DFG report titled “Restoring Central Valley Streams: A Plan for Action.” The letter expressed concern that Ms. Low was one of four co-authors of the report that Mr. Minasian described as having recommendations regarding the Yuba River that Mr. Minasian believed were similar to the SWRCB’s November 7, 2000, draft decision.”³⁰ However, Mr. Minasian went on to state:

“It may be that after further investigation it will be found she had no involvement in the portions of the DFG Report relating to the Yuba River.”
(COR3003-COR3004.)

The SWRCB’s Chief of the Division of Water Rights, Mr. Harry Schueller, responded to Mr. Minasian in a letter dated February 23, 2001. Mr. Schueller advised Mr. Minasian that Ms. Low’s work on the 1993 report involved the Mokelumne, Cosumnes, and Calaveras rivers, and the San Joaquin River Basin and did not include any work on the Yuba River or other rivers in the Sacramento River Basin. (COM3625.)

The scope of Ms. Low’s work on the 1993 report is confirmed in her deposition which explains that, as the San Joaquin River Basin coordinator for the Inland Fisheries Division, Ms. Low wrote sections of the report relating to the San Joaquin Basin streams and the main stem of the San Joaquin River. Ms. Low explained that she also edited draft chapters that other people prepared relating to the Cosumnes, Mokelumne, and Calaveras rivers. The Sacramento Basin portion of the report (including the discussion of the Yuba River) was prepared by one of the other authors. (2003-Staff 1, pp. 17 and 18.) Ms. Low had no involvement in preparing the

³⁰ Mr. Minasian’s letter does not mention the fact that the 1996 draft decision prepared prior to Ms. Low’s employment with the SWRCB proposed higher instream flow requirements and other fishery protection measures that were more stringent than the measures specified in the November 7, 2000, draft decision.

portion of the report discussing the Yuba River, she did not advise any DFG employee regarding any aspect of the Yuba River portion of the report, and she did not read the Yuba River portion of the report prior to its publication. (2003-Staff 2, pp. 82 and 83.) Thus, the record satisfies Mr. Minasian's stated concern in establishing that Ms. Low had no involvement with the portion of the DFG report relating to the Yuba River. Even if Ms. Low had been involved in preparing the portions of the DFG report that addressed the Yuba River, however, subdivision (b) of Government Code section 11425.40 establishes that previous work experience or previously expressed views on an issue are not grounds for disqualification due to bias or prejudice.³¹

YCWA alleges that Ms. Low's testimony tends to show that the SWRCB did not conduct a fair hearing because Ms. Low "had a personal interest in seeing the State Board favor DFG's position in the lower Yuba River proceedings and that she personally favored higher spring instream-flow requirements based on her prior work for DFG." (YCWA memorandum, p. 7.) However, YCWA cites no evidence for the allegation that Ms. Low had a "personal interest" in having higher instream-flow requirements for the Yuba River or the allegation that "she personally favored higher instream-flow requirements [for the Yuba River] based on her prior work for DFG."

The statement in the 1993 report regarding the correlation between high spring flows and increased numbers of returning salmon on the San Joaquin River was based on the work and observations of another biologist and evidence of that correlation was previously introduced into the record for other water right proceedings. (2003-Staff 2, p. 2.) The fact that Ms. Low helped write a report that recognizes an established correlation between high spring flows and returning adult salmon on the San Joaquin River is simply evidence of her experience and qualifications as a fisheries biologist. It does not show that Ms. Low personally favored any particular flow regime for the Yuba River or that the SWRCB did not conduct a fair hearing.³²

³¹ As discussed in section 5.1 above, Government Code section 11425.40 addresses disqualification of a hearing officer for bias or prejudice.

³² YCWA's arguments and allegations regarding previous fishery reports to which Ms. Low has contributed brings to mind the following observation of Justice Rhenquist with respect to a case in which he did not recuse himself even though as an assistant attorney general he had expressed a legal opinion on the issues involved:

"Proof that a justice's mind at the time he joined the court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification not lack
(footnote continued)

Counsel for YCWA asked Ms. Low a number of questions about several reports prepared by the U.S. Fish and Wildlife Service on restoration of anadromous fisheries in the Central Valley. Ms. Low had no involvement in preparing most of the reports. During employment with the consulting firm CH2M Hill, Ms. Low was involved in developing the Comprehensive Assessment Monitoring Program Implementation Plan for the U.S. Fish and Wildlife Service. (2003-Staff 2, pp. 31-36.) However, during the course of that work, Ms. Low did not make any recommendations relating to instream flows, water temperature requirements, or changes in water diversion facilities on the Yuba River. (2003-Staff 2, p. 84.) While working at CH2M Hill, Ms. Low also served as the project manager for preparing a 1998 report titled “Central Valley Project Improvement Act Tributary Enhancement Report.” Her job as project manager involved ensuring that the report was completed on time and within the allocated budget. Although she edited the report for grammar and spelling, she was not involved in writing the draft document and she did not review the substantive content of the report. (2003-Staff 2, pp. 49-51, 84 and 85.)

Ms. Low worked at the SWRCB from 1999 until the first week of February 2001. Prior to adoption of Decision 1644, Ms. Low accepted a job offer from DFG and began work during the first week of February 2001. (2003-Staff 2, pp. 10 and 78-80.) YCWA cites Ms. Low’s employment by DFG as a basis for alleging that the SWRCB did not conduct a fair hearing because it employed an environmental specialist “with personal interests in DFG’s success.” (YCWA memorandum, pp. 5 and 6.) The cases that YCWA cites for the proposition that a hearing is unfair when a decision-maker’s advisers have “personal interests in the hearing’s outcome” involve situations where the advisers have a financial interest in the decision reached by the agency. In this case, there is no evidence that any present or former member of the SWRCB or SWRCB staff involved in the Yuba River proceedings had a financial interest in the outcome. To the contrary, the fact that Ms. Low began work with DFG before adoption of

of bias.” (*Laird v. Tatum* (1972) 409 U.S. 824, 835, 93 S. Ct. 7, 13 (memorandum of Rhenquist, J.))

In cases involving complex technical and biological issues, the SWRCB values having assistance from qualified staff with experience in relevant subjects. The existence of such experience is not evidence of bias.

Decision 1644 establishes that the job was not contingent on the outcome of the Yuba River proceeding, whenever that may finally occur.

The record in this proceeding, including the resumes of numerous expert witnesses, shows that many of the fishery biologists who testified on behalf of various parties, including YCWA, have had extensive employment or contracts with various governmental agencies involved in natural resource management and protection. It would be unusual to find knowledgeable fishery biologists in California who have not done work as an employee or contractor for one or more governmental agencies. The SWRCB and other governmental agencies address potential conflicts of interest by establishing an Incompatible Activities Statement for employees pursuant to Government Code section 19990. (2003-Staff 3, attached Exhibit A to Exhibit 18.) The SWRCB's Incompatible Activities Statement does not restrict employees from accepting a job with another agency simply because that agency was involved in a proceeding before the SWRCB, nor does the SWRCB have authority to impose such restrictions on its employees.³³

The findings and requirements of Decision 1644 are based on the evidence in the record and the SWRCB's application of relevant law. There is no evidence that Ms. Low's acceptance of a job with DFG had any effect at all on Decision 1644.³⁴

³³ Attempting to restrict the future employment of an SWRCB employee based on the employee's involvement in a proceeding before the SWRCB would be totally impractical due to the fact that proceedings such as the current matter or the Bay-Delta water right proceedings can continue for many years. Prohibiting an SWRCB employee from accepting future employment with any governmental agency or other party involved in a dispute before the SWRCB to which the employee was assigned would restrict the employee's future employment options for many years, if not decades. Yet, under YCWA's logic, an SWRCB employee's acceptance of employment by a party to a proceeding on which the employee worked while at the SWRCB would be grounds for any dissatisfied party to the proceeding to allege a denial of due process. The effect of such a conclusion would be to severely undermine, if not paralyze the decision-making process of administrative agencies.

³⁴ Following the 2000 hearing in which Ms. Low assisted, the SWRCB deliberated on the issues addressed at the hearing and distributed a draft decision dated November 7, 2000, which included provisions that were more favorable to positions advocated by YCWA than were provisions of the 1996 draft decision. The SWRCB subsequently distributed a draft decision dated February 15, 2001, that contained additional revisions favorable to positions advocated by YCWA. This does not imply that Ms. Low favored or recommended any particular change from the 1996 draft decision. Rather, it simply reflects the fact that there is no evidence of a correlation between Ms. Low's employment with the SWRCB and the SWRCB's regulation or proposed regulation of water diversions from the Yuba River in a manner opposed by YCWA.

YCWA cites language from an October 19, 2001, ruling by Judge Changaris regarding YCWA's motion to take depositions of SWRCB staff. Judge Changaris expressed a concern that an "alleged bias" resulting from Ms. Low's previous work with DFG and the U.S. Fish and Wildlife Service "could have resulted in her being the *de facto* decision maker." (YCWA memorandum, p. 7, citing Ruling on Motion for Discovery dated October 19, 2001, emphasis added.) Judge Changaris' ruling was made based on allegations by YCWA prior to Ms. Low's deposition. Our review of the record shows no evidence that Ms. Low had any bias either for or against any party to this proceeding. Moreover, it is inconceivable that anyone could review the transcripts of SWRCB meetings prior to adoption of Decision 1644 and conclude that any member of the SWRCB's staff was the *de facto* decision-maker in this matter. Decision 1644 and the present order are decisions of the SWRCB Board Members.

5.4 Participation of Andrew Sawyer in SWRCB Proceeding

YCWA contends that it was denied a fair hearing in the Yuba River proceedings due to the participation of SWRCB Assistant Chief Counsel Mr. Andrew Sawyer in the process that led to adoption of Decision 1644. The March 13, 2003, memorandum of points and authorities that YCWA filed with the Court alleges that: (1) the Mother Lode Chapter of the Sierra Club was a party to the 1992 hearing and submitted comments after the 2000 hearing advocating that the SWRCB impose higher instream flow requirements; (2) Mr. Sawyer had a personal interest in the success of a party adverse to Yuba, the Mother Lode Chapter of the Sierra Club; and (3) Mr. Sawyer was involved in all stages of the SWRCB's lower Yuba River proceedings including closed session deliberations regarding draft decisions. The record regarding those allegations is discussed below.

5.4.1 Sierra Club Participation

The record shows that Mr. Richard Thomas, a representative of the Sierra Nevada Group of the Mother Lode Chapter of the Sierra Club, appeared briefly at the 1992 hearing and asked to read a written statement into the hearing record. (92RT3096-92RT3101.) Mr. Thomas' statement presented general information about the history of the Yuba River, the uses of its water, and the value of protecting what remains of natural places. With regard to the specific issues addressed in Decision 1644, the statement contains the general recommendation that "We must also ensure

adequate flows to enhance and restore the river to an unquestionable and readily sustainable level of biological diversity and health.” (92EX4218-4220.) In response to cross-examination by DFG, Mr. Thomas also said that there was a need for additional recreational access to the Yuba River. In response to a question from a representative of the California Sportfishing Protection Alliance about fish ladders, Mr. Thomas stated that he was not familiar with the technical matters involved but that he “would support the return of salmon to their native habitat.” (92RT3101–92 RT3103.)

At the conclusion of Mr. Thomas’ statement, counsel for YCWA stated that he had no cross-examination and that he “would request that Mr. Thomas’s statement be treated as a policy statement” because “it was really very similar to the policy statement[s] submitted by other organizations.” (92RT3102.)

No group or organization from any level of the Sierra Club submitted a legal brief following the 1992 hearing, nor did any group from the Sierra Club participate in the 2000 hearing or submit a legal brief following that 2000 hearing. Out of an administrative record in excess of 31,000 pages, the only material provided by any group from the Sierra Club prior to distribution of the November 7, 2000, draft water right decision was the short written statement from the Sierra Nevada Group that was read into the record at the 1992 hearing. Thus, participation in the hearing process by any group from the Sierra Club was minimal and was recognized as such by counsel for YCWA who suggested that Mr. Thomas’ statement be treated as a “policy statement.” Of the several hundred citations to the record in Decision 1644, none are to any evidence submitted by Mr. Thomas or the Sierra Club. Due to the fact that Mr. Thomas’ statement was treated as part of the hearing record, however, Decision 1644 lists the Mother Lode Chapter of the Sierra Club among the parties who presented evidence in support of protecting of fishery and other public trust values. (Decision 1644, p. 6.)³⁵

In accordance with SWRCB regulations, the hearing notice for the 1992 hearing explains that people who want to make a non-evidentiary statement regarding the issues under consideration

³⁵ The only aspect of the statement that was evidentiary in nature concerned recreational access to the lower Yuba River. Decision 1644 does not include any requirements regarding provision of recreational access.

may make a non-evidentiary policy statement, but that the statement shall not be used to introduce evidence on factual matters. (Cal. Code Regs., tit. 23, § 648.1.) In responding to the request of counsel for YCWA to treat Mr. Thomas' statement as a policy statement, the hearing officer stated that the statement was similar to a policy statement, but the Sierra Club had sought to participate as an interested party, and the hearing officer did not think that distinction would be all that significant. (92RT3102.) If the hearing officer had accepted YCWA's suggestion to consider Mr. Thomas statement as "policy statement," then no organization within the Sierra Club would have been listed as a "party" to the proceeding and, presumably, YCWA would not have alleged that it was denied a fair hearing based on Mr. Sawyer's participation in totally unrelated Sierra Club activities.

The declaration attached as Exhibit 18 to Mr. Sawyer's deposition explains that there are thirteen chapters of the Sierra Club within California of which the Mother Lode Chapter is one.

Mr. Sawyer's declaration goes on to explain:

There are ten active groups within the Mother Lode Chapter. The Sierra Nevada Group is the group for the area within Sierra, Nevada, southern Sutter, and southern Yuba counties. Chapters and groups are involved in a broad range of activities, including education, outings, conservation, and political activities. A group may participate in the name of the Sierra Club in administrative proceedings before state or local agencies on its own initiative. Ordinarily, a group's participation in these proceedings does not require approval from the chapter. (2003-Staff 3, Exhibit 18, p. 3.)

Mr. Sawyer's declaration states that he had no personal knowledge of whether the Sierra Nevada Group of the Mother Lode Chapter or any other Sierra Club committee sought approval of the Mother Lode executive committee for participation in the SWRCB proceedings, but that such approval was not required. The matter would not ordinarily come before the Mother Lode Chapter legal committee because it was an administrative proceeding rather than a court action. (2003-Staff 3, Exhibit 18, p. 4.)

Based on Mr. Thomas' oral testimony and the Sierra Nevada Group letterhead on which the statement was submitted, Decision 1644 should be revised to clarify that the Sierra Nevada Group of the Mother Lode Chapter of the Sierra Club presented the statement in the 1992

hearing. Thus, if any entity within the Sierra Club organization is to be considered a “party” to the adjudicative hearing process before the SWRCB, that entity should be the Sierra Nevada Group of the Mother Lode Chapter. The comments were submitted on the Sierra Nevada Group’s letterhead, the Sierra Nevada Group’s participation did not require the approval of the Mother Lode Chapter, and there is no evidence that any committee at the Mother Lode Chapter approved the comments that were submitted. Therefore, the Sierra Nevada Group comments at the 1992 hearing should not be attributed to the Mother Lode Chapter or to any Mother Lode Chapter committee on which Mr. Sawyer volunteers.

Review of the Sierra Nevada Group’s comments from the 1992 hearing indicates it is questionable if the comments should be considered adverse to YCWA. The statements about protecting and restoring fishery resources in the Yuba River are consistent with the purposes of use specified in YCWA’s water right permits and consistent with the statements from YCWA during the 2000 hearing about the anticipated benefits of its minimum instream flow proposal.³⁶ The issues before the SWRCB concerned how best to protect fishery resources in light of competing demands for water and other considerations. The Sierra Nevada Groups’ statement at the 1992 hearing provided no evidence regarding resolution of those issues.

From the documents in the record, it appears that the only other involvement by Sierra Club representatives in the proceedings leading to Decision 1644 consists of comments on the draft water right decisions dated November 7, 2000, and February 16, 2001. Following distribution of the draft decisions, the SWRCB received written and oral comments from over 500 people and organizations, most of whom had not participated in the evidentiary hearing. Those comments included two letters and one oral statement at a board meeting by various Sierra Club representatives. People or organizations that simply comment on a draft order or decision of the SWRCB at a public meeting or in writing are not ordinarily considered to be “parties to the proceeding.” They are simply accorded the right to comment on proposed actions before the SWRCB pursuant to provisions of the Bagley-Keene Open Meeting Act. (Gov. Code

³⁶ The SWRCB does not agree that the flows proposed by YCWA would provide satisfactory protection for fish, but YCWA has stressed the alleged benefits of its proposal for fish.

§ 11125.7.) The Sierra Club has not been a party to any of the litigation regarding Decision 1644, nor did the Sierra Club participate in the SWRCB hearing on June 5 and 6, 2003.

5.4.2 Mr. Sawyer's Involvement in Sierra Club Activities

The most succinct explanation of Mr. Sawyer's participation in the Sierra Club and the organizational structure of the Sierra Club is provided by Mr. Sawyer's declaration dated September 5, 2002, which is attached as Exhibit 18 to his December 23, 2002, deposition. (2003-SWRCB 3, Exhibit 18, pp. 2-5.) Mr. Sawyer's declaration states:

“The Sierra Club is a non-profit public benefit corporation, incorporated in California, whose affairs are managed by a fifteen-member board of directors. I am not a member of the board of directors. I am not a paid officer or employee of the Sierra Club. I have never run for the Sierra Club board of directors, or applied for a position as a paid officer or employee of the Sierra Club.” (2003-Staff 3, Exhibit 18, p. 2.)

Mr. Sawyer's declaration states that he does volunteer work on his own personal time for the Sierra Club.³⁷ Over the years, that work has included serving as an outings leader, serving as a member of the executive committee of the Mother Lode Chapter, and serving for many years as the chair of the Mother Lode Chapter legal committee. In accordance with the SWRCB's Incompatible Activities Statement, Mr. Sawyer's declaration states that he avoids participation on behalf of the Sierra Club in activities or decisions regarding matters that are before or may eventually come before, the SWRCB. (2003-SWRCB 3, Exhibit 18, pp. 2-4.)³⁸ Mr. Sawyer's undisputed testimony in his deposition confirms that he has avoided participation in any activities of the Mother Lode Chapter of the Sierra Club that may eventually come before the SWRCB. (2003-Staff 3, pp. 119 and 120.)³⁹

³⁷ Mr. Sawyer's deposition also indicates that he has been involved in number of other volunteer activities including speaking at many continuing legal education programs sponsored by the Association of California Water Agencies and serving as vice chair, and chair of the California State Bar Environmental Law Section. (2003-Staff 3, pp. 120-124.)

³⁸ Mr. Sawyer's declaration dated September 5, 2002, states that, in response to a request from former SWRCB Chief Counsel William R. Attwater, Mr. Sawyer prepared a memorandum several years ago that describes his volunteer activities with the Sierra Club and the actions he takes to avoid conflict of interest situations in his employment by the SWRCB. The memorandum is attached as an exhibit to Mr. Sawyer's declaration. (2003-Staff 3, Exhibit B to Exhibit 18.)

³⁹ Mr. Sawyer's testimony in this respect is fully consistent with his statement in his written memorandum to M. Attwater prepared several years earlier.

In summary, Mr. Sawyer has been an active volunteer and participant in Sierra Club affairs for many years, but he had no involvement with the statements of Sierra Club members before the SWRCB in the earlier Yuba River proceedings. Mr. Sawyer testified in his deposition that he did not participate in the preparation or review of, or provide any input to, the testimony that Richard Thomas gave in 1992 or the letters that were sent to the SWRCB by other Sierra Club members nine years later in 2001. Similarly, he had no input to the decision of any Sierra Club committee or volunteer to participate in the SWRCB's lower Yuba River proceeding. (2003-Staff 3, pp. 113-118.) There is no evidence in the record that Mr. Sawyer had a personal interest in the outcome of that proceeding.

5.4.3 Summary of Mr. Sawyer's Role in Lower Yuba River Proceeding

As an Assistant Chief Counsel for the SWRCB, Mr. Sawyer has supervised between eleven and fourteen attorneys assigned to the Water Rights and Tanks Branch of the SWRCB's Office of Chief Counsel depending on the time in question. (2003-Staff 3, pp. 16 and 17.) During the proceedings leading to adoption of Decision 1644, Mr. Sawyer served as supervisor to Senior Staff Counsel Daniel Frink who was the staff attorney assigned to assist with the lower Yuba River proceedings. Mr. Sawyer testified that he did not provide comments on the 1994 staff analysis of the 1992 hearing record. (2003-Staff 3, pp. 107 and 108.) In his job as Assistant Chief Counsel, Mr. Sawyer commented on some drafts of the proposed water right decision, and attended some of the closed sessions at which the SWRCB deliberated on the issues involved in Decision 1644. (2003-Staff 3, Exhibit 18, p. 6.)⁴⁰ Although Mr. Frink has continued to assist the SWRCB as the staff attorney assigned to this matter, he is no longer working primarily on water right matters and Mr. Sawyer is no longer his supervisor. (2003-R.T. 11:24-11:25.) Mr. Sawyer has not been involved in the SWRCB proceeding to reconsider Decision 1644 in response to the Court's order and has not met or consulted with SWRCB Board Members or SWRCB staff with regard to preparation or adoption of this order. (2003-R.T. 10:22-13:9.)

⁴⁰ Former SWRCB fishery biologist Ms. Alice Low who served on the staff hearing team testified that Mr. Sawyer was not present at the closed session discussions regarding the Yuba River that she attended. (2003-Staff 2, p. 72.)

YCWA contends that the SWRCB should not have allowed Mr. Sawyer to participate in the preparation of the draft decisions or in discussions with SWRCB Board Members while he was a member and chairman of various committees of the Mother Lode Chapter of the Sierra Club because the Mother Lode Chapter was a party to the proceeding. (Joint Closing Brief of Yuba County Water Agency and Browns Valley Irrigation District, dated June 13, 2003, p. 2.) As discussed above, however, the record indicates that the only participation as a “party” to the SWRCB proceedings from any group within the Sierra Club was Mr. Thomas’ brief statement in 1992 on behalf of the Sierra Nevada Group, one of ten groups within the Mother Lode Chapter. At that time, counsel for YCWA quite properly observed that Mr. Thomas’ statement was more of a policy statement than an evidentiary presentation by a party. There was no subsequent involvement by any level or representative of the Sierra Club until after release of a draft water right decision on November 7, 2000. Following release of the November 7, 2000, draft decision, the SWRCB received comments from over 500 other interested individuals and organizations, including two letters from Sierra Club representatives.⁴¹

As discussed in section 5.4.2 above, there is no evidence that Mr. Sawyer had a “personal interest” in the outcome of the proceeding. He has no financial interest in the outcome of the proceeding, he has never been a member of the Board of Directors of the Sierra Club, and he had no involvement with any of the statements presented in SWRCB proceedings by Sierra Club representatives. In addition, in his volunteer work with the Sierra Club, Mr. Sawyer removes himself from all discussion and decisions regarding matters that may come before the SWRCB. There is no evidence that Mr. Sawyer is biased against YCWA or any other party to the proceeding and there is no legal basis for disqualifying Mr. Sawyer from assisting the SWRCB in the lower Yuba River proceedings.

5.5 Conclusions Regarding Denial of Due Process Allegations

Contrary to contentions of YCWA and various water diverters, the depositions of Mr. Mainz, Ms. Low, and Mr. Sawyer provide no basis for concluding that their work as staff to the SWRCB

⁴¹ As noted previously, Decision 1644 includes several changes from the provisions of prior draft decisions that are generally more favorable for YCWA’s position and less favorable to the position of those advocating more stringent requirements for protection of fish. Thus, there is no evidence that the comments on the draft decision submitted by various Sierra Club representatives influenced the SWRCB to adopt requirements adverse to YCWA’s position.

resulted in bias against or denial of a fair hearing to YCWA or any other party. In contrast to the unsupported allegations of bias, the detailed citations to the record in Decision 1644 confirm that Decision 1644 is well-supported by the evidentiary record. In several key respects, the SWRCB adopted the recommendations of YCWA and, in many respects, the minimum flow requirements in Decision 1644 are much closer to YCWA's recommendation at the hearing in 2000 than they are to recommendations in the 1991 DFG Plan. Rather than reflecting a bias against YCWA, Decision 1644 reflects a broad acceptance of YCWA's proposals where supported by the record.

The major differences between the YCWA proposal at the 2000 hearing and Decision 1644 (as amended by Order WR 2001-08) are: (1) Decision 1644 balances the available water supply in dry, critical, and extreme critical years between instream and offstream uses, rather than following YCWA's recommendation to greatly reduce minimum flow requirements in order to make water available to fully meet YCWA's estimated future demands for offstream uses at full development; and (2) Decision 1644 rejects several of YCWA's legal arguments, including the argument that YCWA "retains" rights to water released for instream flow requirements after that water has left the place of use authorized in YCWA's water right permits. (SWRCB Order WR 2001-08, pp. 35-38.)

The fundamental differences between YCWA's recommendations at the hearing in 2000 and the minimum flow requirements adopted in Decision 1644 are not based primarily upon differing interpretations of the evidence regarding flows for protection of fish and fishery habitat in the Yuba River.⁴² Rather, they are due to differing positions regarding legal and policy issues addressed in Decision 1644. Most important among these differences is that, in contrast to YCWA's proposal to allocate all shortages in dry, critical, and extreme critical years to instream uses, Decision 1644 is based on the conclusion that California water law and sound public policy require a balancing of competing needs when there is insufficient water available to meet all demands. This was the position of the SWRCB when Decision 1644 was adopted in 2001, and it remains our position, without regard to what staff is assigned to assist with a particular project.

⁴² As discussed in section 2.2 above, the instream flow proposal presented by YCWA in 2000 proposed flows that were the same or very similar to flows adopted in Decision 1644 for wet, above normal and below normal years.

Mr. Meinz, Ms. Low and Mr. Sawyer are three of numerous current or former employees who have assisted the SWRCB during the many years that fishery issues on the Yuba River have been under consideration. They did not serve as the hearing officer for the SWRCB proceedings and they were not the decision-makers who adopted Decision 1644. There is no evidence whatsoever that any of the three individuals identified by YCWA, or any other SWRCB employee was biased against YCWA or other parties. Mr. Meinz and Ms. Low no longer work for the SWRCB. Neither they nor Mr. Sawyer had any involvement in the June 5 and 6, 2003, hearing or in assisting with the SWRCB's deliberations following that hearing.⁴³

The record shows that the SWRCB has deliberated at length on the complicated issues of fishery protection and balancing competing uses of water from the Yuba River. Following distribution of a draft decision in November 2000, the SWRCB received comments from parties to the proceeding and numerous other interested persons. Based on evaluation of those comments and further deliberations, the SWRCB made several revisions to the provisions of the draft decision. The SWRCB Board Members' comments at the time of adopting Decision 1644 reflect the importance that they placed on this matter and the large amount of time and effort that SWRCB Board Members personally invested in the proceedings leading to adoption of Decision 1644. (COR0390-COR0396.)

It has become increasingly clear that the primary basis of the dispute in this proceeding is not a dispute among biologists regarding appropriate flow levels and other protections for fish in the lower Yuba River. Rather, the dispute is between the SWRCB's exercise of its legal responsibility and authority to protect fishery resources in a balanced manner and the interest of

⁴³ In addition to YCWA's unfounded allegations of bias concerning Mr. Meinz, Ms. Low, and Mr. Sawyer, in a letter dated May 30, 2003, counsel for YCWA raised a similar objection for the first time regarding Senior Staff Counsel Daniel Frink. Counsel for YCWA contends that Mr. Frink should be prevented from assisting the SWRCB in this matter primarily due to his prior work and association with Mr. Sawyer, who YCWA alleges to be biased. Thus, over 12 years following Mr. Frink's assignment to assist with the Yuba River proceeding, several months after counsel for YCWA first alleged that Mr. Sawyer is biased, and five days before the hearing that was held at the direction of the Court, YCWA charged that yet another SWRCB staff member has a conflict of interest and should be prevented from assisting the SWRCB. As in the case of Mr. Meinz, Ms. Low, and Mr. Sawyer, there is no evidence that Mr. Frink has a conflict of interest or bias in this matter. YCWA's request was denied for the reasons stated by SWRCB Chairman Arthur Baggett at the start of the hearing on June 5, 2003. (2003-R.T. 10:22-13:3.)

YCWA and other water diverters in remaining free from establishment of minimum flow requirements that could limit water diversions for local use in some years or reduce YCWA's ability to sell water for use in other areas outside the authorized place of use specified in its permits. There is no basis in the record, however, for any party to seriously contend that either Decision 1644 or this order is the result of an unfair hearing process.

6.0 CONCLUSION

The record establishes that Decision 1644 was adopted by the SWRCB following a lengthy hearing process in which all parties were accorded full due process of law. The decision is well-supported by the record and it includes detailed findings and citations to supporting evidence in the record. The record does not support allegations of bias on the part of any SWRCB staff members who have been involved in the proceedings leading to adoption of Decision 1644. Moreover, the numerous staff members who have assisted the SWRCB in the process leading to adoption of Decision 1644 were not and are not the decision-makers. The record shows that SWRCB Board Members carefully considered the extensive oral and written comments on various draft decisions and included significant modifications where appropriate.

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The declarations and testimony presented on behalf of YCWA, and the California Energy Commission report presented by SYRCL provide some additional information but do not provide a basis for any substantial changes in Decision 1644. In view of the passage of time and the additional information presented at the hearing on June 5 and 6, 2003, the SWRCB concludes that it is appropriate to make several minor revisions and clarifications in the wording of Decision 1644, as set forth below. With those revisions, the SWRCB concludes that Decision 1644 should be adopted as Revised Decision 1644 and that Decision 1644 (as previously amended by Order WR 2001-08) should be vacated.

ORDER

IT IS HEREBY ORDERED that, Decision 1644 as amended by Order WR 2001-08 is vacated.

IT IS FURTHER ORDERED that, Revised Decision 1644 is adopted with the following revisions to Decision 1644, as previously adopted and amended by Order WR 2001-08. The locations of the revisions are specified with reference to the page numbers of Decision 1644.

1. Add the following new paragraph as the first new full paragraph on page 3 and add a footnote to the new paragraph as shown below:

“The majority of this decision was adopted on March 1, 2001 as Decision 1644. Decision 1644 was amended by Order WR 2001-08 on May 17, 2001. This decision includes further revisions based on the record developed at a supplemental hearing held on June 5 and 6, 2003, pursuant to direction of the Yuba County Superior Court to consider additional evidence that became available following adoption of Decision 1644.”

New footnote at end of above paragraph: “The SWRCB’s findings regarding the evidence and issues considered during the June 5-6, 2003 hearing are set forth in detail in SWRCB Order WR 2003-xx.”

The footnotes following the new footnote are renumbered consecutively.

2. Revise the last sentence of the last paragraph on page 6 and add a new footnote to the revised sentence, as follows:

“Walter Cook, the South Yuba River Citizens League (SYRCL) and the Sierra Nevada Group of the Mother Lode Chapter of the Sierra Club presented evidence in support of adopting additional requirements for protection of fishery and other public trust values of the lower Yuba River.^{fn,}”

Add new footnote as follows: SWRCB Order WR 2003-xx discusses the very limited nature of the presentation of the Sierra Nevada Group of the Mother Lode Chapter of the Sierra Club.”

The footnotes following the new footnote are renumbered consecutively.

3. Add the following sentence at the end of the last full paragraph on page 22:

“Following issuance of Decision 1644 in 2001, YCWA received approval to transfer 164,052 acre-feet of water in 2001, 162,050 acre-feet of water in 2002, and 200,000 acre-feet of water in 2003 (SWRCB Orders WRO 2001-03, WRO 2001-16, WRO 2002-05, WRO 2003-08.)”

4. Revise the third sentence of the first full paragraph on page 23 to read as follows:

“The State Board has approved ~~all~~ 14 18 request for water transfers submitted by YCWA.”

5. Revise the third full sentence on page 42 to read as follows:

“Emigration of ~~yearlings~~ juveniles occurs from March into June. (DFG 26, p. 2.)”

6. The first sentence of the second paragraph on page 61 is revised to read as follows:

“One of ~~the~~ primary fishery considerations in the April through June period is to provide adequate flows for juvenile Chinook salmon and steelhead emigration.”

7. Add the following footnote at the end of the third full paragraph on page 62:

“YCWA presented additional data during the 2003 hearing related to outmigration of chinook salmon and steelhead. For a discussion of this data, please see SWRCB Order WR 2003-xx.”

The footnotes following the new footnote are renumbered consecutively.

8. Revise the citations beginning on the third line of page 93 to read as follows:

“(South Yuba 8, p. 2; R.T. II, 82:7-82:17;~~DFG 26, p. 99;~~ R.T. I, 108:19-108:25;
R.T. II, 108:23-109:12; R.T. III, 139:12-142:10,R.T. III, 150:20-151:15
and~~217:16-218:6;~~ S-R.T. 216:23-217:3.)”

9. Add the following new footnote to the second sentence of the first paragraph of Section 7.0 on page 100:

“For purposes of this decision, references to YCWA’s present level of demand refer YCWA’s water demands at the time of the hearing in 2000. YCWA’s evidence of recent increases in water demand since that time are addressed in SWRCB Order WR 2003-xx.”

The footnotes following the new footnote are renumbered consecutively.

10. Revise the first sentence of the third full paragraph on page 106 to read as follows:

“Based on the evidence in the record, we conclude that the extent of the need for lower Yuba River water in the Wheatland area and for additional municipal and industrial uses in Yuba County has not been established.”

11. Revise the fourth sentence of the second full paragraph on page 107 to read as follows:

“The record remains unclear ~~as to~~ regarding when ~~and if~~ the full level of the projected demands for surface water in the Wheatland and Dry Creek areas may~~will~~ be reached.”

12. Revise the last sentence of the first paragraph of Section 7.5 on page 111 to read as follows:

“As discussed in Section 7.2 above, YCWA’s projected increases in demand for surface water from the lower Yuba River ~~are very~~remain speculative.”

13. Add the following footnote to the end of the first sentence on page 114:

“The historic demand figures in this decision are based on the historic water demands reported by YCWA at the hearing in 2000.”

The footnotes following the new footnote are renumbered consecutively.

14. Revise the first sentence of the second paragraph on page 127 to read as follows:

“However, in view of the critical electrical power situation in California ~~at the present time~~ during 2000 and 2001, and the need to maintain flexibility in powerplant operations to avoid serious electricity shortages, we conclude that it is appropriate in this instance to defer imposition of the long-term instream flow requirements established by this decision for a period of five years until April 21, 2006.”

15. Revise the last sentence of the second paragraph on page 131 to read as follows:

“Any request for a temporary reduction in instream flow requirements must be submitted ~~by April 7 of the year for which the reduction is~~ no later than five days after the date of release of the Department of Water Resources April 1 or May 1 forecast of unimpaired flow in the Yuba River at Smartville. requested, in order to facilitate action by the Division Chief upon the request prior to April 21 of each year.”

16. Add the following sentence to the end of the first paragraph on page 147:

“In addition, the flow requirements specified in this decision are exempt from CEQA as an enforcement action to define the instream flow requirements necessary for compliance with Fish and Game Code section 5937. (14 Cal. Code Regs. § 15321.)”

17. Add the following footnote at the end of the first sentence under the “Order” heading on page 173:

“The dates for submittal of documents as specified in this decision are from Decision 1644, as adopted on March 1, 2001, and amended by Order WR 2001-08 on May 17, 2001. The SWRCB recognizes that many of the documents required by Decision 1644 have been submitted following adoption of Decision 1644 in 2001. In instances where documents have been approved pursuant to the provisions of Decision 1644, those documents need not be re-submitted.”

The footnotes following the new footnote are renumbered consecutively.

18. The first condition to be added to Permits 15026, 15027, and 15030 of Yuba County Water Agency is revised as previously provided on pages 45 through 47 of Order WR 2001-08. *[Note: This condition was previously set forth on pages 177 and 178 of Decision 1644 and was revised by the first provision of Order WR 2001-08. The revision is mentioned here in order to provide a complete description of the changes to the provisions of Decision 1644.]*

19. Paragraph “a” of the second term to be added to Permits 15026, 15027, and 15030 of Yuba County Water Agency which is shown on pages 175 and 176 is revised to delete the third sentence which was included as erroneous repetition of the preceding sentence. The revised term reads as follows:

“Permittee shall diligently pursue development of the Narrows II Powerhouse Intake Extension Project at Englebright Dam, in coordination with the Department of Fish and Game, the United States Fish and Wildlife Service and the National Marine Fisheries Service. Permittee shall submit proposals for project funding and prepare all appropriate CEQA documentation for project development in a timely manner. ~~Permittee shall submit proposals for project funding and prepare all appropriate CEQA documentation for project development in a timely manner.~~ Permittee shall submit a report to the Chief of the Division of Water Rights on the status of its application for funding and the progress of project development every six months from the date of this Order through the completion of project construction.”

20. The last sentence of the second full paragraph on page 181 of Decision 1644 is revised as shown below:

“Any request for a temporary reduction in instream flow requirements shall be submitted no later than five days after the date of release of the Department of Water Resources April 1 and May 1 forecast of unimpaired flow in the Yuba River at Smartville by April 7 of the year for which the reduction is requested, in order to facilitate action by the Division Chief upon request prior to April 21 of each year.” *[Note: This revision to Decision 1644 was made previously by Order WR 2001-08 and is included in the revisions shown in this order for convenience.]*

21. The time for submittal of a plan to reduce fish losses by Brophy Water District specified in the last paragraph of page 188 of Decision 1644 is corrected to March 31, 2002. *[Note: This correction to Decision 1644 was made previously by Order WR 2001-08 and is included in the revisions shown in this order for convenience.]*

22. The heading “Further Action” and the first paragraph at the top of page 191 is deleted.

23. The following heading and paragraph are added at the end immediately above the Certification provision:

Relation to Order WR 2003-xx

“The findings and conclusions of Order WR 2003-xx are incorporated into this decision.”

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 16, 2003.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Debbie Irvin
Clerk to the Board